No. 3915

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

L. E. DOAN,

Appellant,

vs.

B. T. DYER,

Appellee.

BRIEF FOR APPELLEE

W. H. METSON,
R. G. HUDSON,
Attorneys for Appellee.

The James H. Barry Co., San Francisco.

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LIST OF AUTHORITIES CITED

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BRIEF FOR APPELLEE

NO PARTNERSHIP

1. Appellant states in his brief that there is no evidence to sustain the findings that there was a partnership between the complainant and the defendant.

This agreement of partnership was made in the State of California, and the laws of the State of California become a part of the agreement. C. C. P., Sec. 1646.

Among the reasons stated by counsel that there was no partnership are the following:

There was no firm name; no joint bank account, nor

common fund, no common books of account; none of the commissions that Dyer received were ever placed in any joint account; they had no letterheads with the names of Dyer & Doan upon them; that business was transacted in the individual names of the parties; that Doan advanced all the money; that Doan had full sway in the business; that Dyer was an agent; that each transaction was separate and independent; that Doan assumed all the risk and paid all the losses; that the partnership funds were not accumulated; that Dyer had independent dealings with one Leland; that Dyer did not account for commissions received from Jergins. (See Tr., 312.) Not true.

Counsel then states that after Doan became interested in Louisiana there was a marked change in the relationship of the parties.

Another objection that counsel has to the decree is stated by them in the following language:

> "It is respectfully submitted that the interlocutory decree runs counter to the well-established rule that a partnership can never be created by implication or operation of law apart from the express or implied intention and an agreement to constitute the relation" (Appellant's Brief, page 17).

At page 25 counsel states:

> "The several letters addressed by the parties to one another during the time that Doan was engaged in developing the Louisiana properties .

. . conclusively show that the parties were not partners but that on the other hand they were each engaged in independent ventures."

2. WHAT IS A PARTNERSHIP.

Section 2395 of the C. C. of California defines a partnership as:

> "An association of two or more persons for the purpose of carrying on business together, and dividing the profits between them."

Kent defines a partnership as follows:

> "A contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions."

According to these definitions all that the parties need to do to constitute themselves partners is associate themselves together, do business and agree to divide the profits; the law does the rest.

There is no requirement that business be done under a firm name, there is no requirement that there be a common fund or joint account and counsel cites no authority to sustain these propositions.

In *Westcott* vs. *Gilman,* 170 Cal. 562, the Edmund Peycke Co. wrote a letter to Gilman agreeing to sell oranges and lemons on their joint account, Gilman to

do the buying, to pay for the packing house, the fruit to be secured upon consignment if possible, otherwise the Company to furnish the money. Gilman to receive $5.00 for each car shipped, and packing house expenses to be charged against the joint account. Profits and losses to be divided equally. The Court held this to be a partnership. At page 567 the Court said:

> "Appellant next asserts that there is no mutuality of agency in the contract and relationship of these parties and that such mutuality of agency is essential to the partnership . . . But the facts that Gilman was the fruit buyer for the joint venture and that the Peycke Company reserved the right to veto prospective purchases if the price was not satisfactory to it . . . are far from being determinative of the question. In this aspect the case is as that presented in *Clark* vs. *Gridley*, 49 Cal. 105. This court had no difficulty in declaring a partnership to exist where one of the parties to it was to buy wool in Marysville and ship the wool to the co-partners in San Francisco, drawing drafts upon them for the payment of the wool, the profits and losses to be shared equally. . . ."

Page 568.

> "The non-existence of a partnership in this case, it is further declared, rests upon the fact that there was 'no community of interest in procuring the fruit.' This can only mean that because Gilman was to devote his services to the work of procuring it, precisely as the Peycke Company was to devote its services to the handling and sale of it, each without charge, no partnership

existed. But so untenable is this position that it needs only the statement for its refutation. . . ."

Page 569.

"Of course a partnership may be organized for the prosecution of one or two adventures, as well as for the conduct of a general and continuous business. It is not of the essence of a partnership that the parties to it should have known that their contract in law created a partnership . . . If by contract or by conduct or by both they have in point of law engaged in a partnership venture, so far as third persons are concerned, they cannot be heard to deny the relationship and the liabilities arising therefrom. It is plain from the very terms of the agreement between these defendants that it measures up to the definition of a partnership as declared by Section 2395 of the Civil Code."

According to this decision it was immaterial that Mr. Doan furnished the money and took the titles in his own name, or that he directed the operations or that Mr. Doan did one part of the work and Mr. Dyer did another part of the work. Nor did it destroy the partnership because the conduct of the business was not continuous but consisted of separate acts. Nor is it the law that a partnership can be created only by consent of the parties, for as this case shows the relation of partnership may be imposed upon parties against their desire and their wish, and contrary to their intent.

In *Chapman* vs. *Hughes,* 104 Cal. 302, at page 304, the Court said:

> "The syndicate agreement did, in our judgment, constitute a partnership within the definition of Section 2395 of the Civil Code. It created an association of three persons for the purpose of carrying on together the business of selling lands, and dividing the profits of that business between them. It contemplated united action in advertising and otherwise in promoting sales, and a joint expense to be incurred thereby, and further expressly provided for the payment *to the syndicate* of commissions on sales of other lands than those put into the syndicate.
>
> This was sufficient to constitute the relation of partnership. Whether the parties knew that they were partners or not, they certainly intended and contracted to do all that in law is necessary to create a partnership. The relation of partnership may be established, although the parties may not expressly intend to create such relationship . . .
>
> The respective parcels of land embraced in the syndicate were contributed by the respective partners, and thereby became subject to the general agreement. (Civ. Code, Secs. 2401-03.) This was not affected by the agreement that each partner should retain *his title;* they held the legal title in trust for the partnership use."

In the case at bar Mr. Doan held the legal title to all of these lands and also to the stock in the Doan Oil Company in trust for the partnership, Doan & Dyer.

In *Krasky* vs. *Wollpert,* 134 Cal. 338, Charles Wollpert and H. A. Krasky formed a partnership

and it was agreed that the business should be carried on under the name of H. A. Krasky. At page 341, the Court said:

> "That defendant Wollpert allowed the business to be run under the name of his co-defendant; that he paid similar bills; that he paid one hundred dollars on this note . . . are all circumstances corroborating the testimony of Krasky that a partnership existed between defendants."

In *Lanpher* vs. *Warshauer,* 28 Cal. App. 457, at page 459, the Court said:

> "The Court expressly finds that the parties to the action did agree upon the subject of engaging in a certain building venture, wherein the skill and labor of one was to be combined with the capital of the other, and that the profits and losses of the business were to be equally shared. Such an agreement satisfies the code definition of a partnership."

Later in this Brief it will be shown that Dyer supplied skill, time, opportunities and large sums of money.

Measured by these authorities, a partnership must have existed between Mr. Doan and Mr. Dyer.

3. *Was the Doan Oil Company an asset.*

There are two phases to this question, first was the company originally an asset, and second was it lost to the company by reason of a forfeiture for failure of

Mr. Dyer to pay up his portion of the capital stock. The first phase will be here considered.

Messrs. Dyer and Doan occupied offices in the City of San Francisco in the Balboa Building.

On the 29th day of March, 1918, J. F. Lucey, one of the incorporators of the Doan Oil Company, sent the following telegram to B. T. Dyer, the complainant herein, from Houston, Texas:

> "It is the consensus of opinion that Ranger fields lying between Ft. Worth, Brownwood, Coleman, offer possibilities as great as Oklahoma . . . Believe that you and Doan could make great success but question the advisibility of you coming alone. It requires two. You and Doan have the necessary combination of ideas and energy to make good . . ." (Tr. p. 106).

Soon after receiving this telegram Mr. Dyer went to the Texas oil fields.

The partnership about which this litigation arose had its inception in the long-time friendship between Doan and Dyer.

They met at various places in the oil fields in 1907. They later had offices together. They dealt together. This particular partnership originated with the telegram received by Dyer from Lucey on March 29, 1918, which Dyer showed to Doan and about which they talked.

In that telegram from Houston, Texas, Lucey to Dyer, at the office of Doan and Dyer, San Francisco,

Lucey said: "It is consensus of opinion that Ranger "Fields . . . offer possibilities as great as Okla- "homa . . . am so impressed that have author- "ized installation of two stores . . . believe you "and Doan could make great success but question the "advisability of you coming alone. It requires two. "You and Doan have the necessary combination of "ideas and energy to make good. In my opinion "there would be no question of your doing so . . . "We will perhaps see the greatest drilling campaign ". . . in the history of the country . . . Pos- "sibilities are very big and the extent of the field so "great that it is difficult to describe them to you in "this wire" (Tr. pp. 106-107).

Later Dyer saw Doan and on May 9, 1918, from New York wired him at San Francisco: "Carr and "Lucey here. They report Texas wonderful. Lucey "says had we come when they wired we would have "made more than we would have made in California. ". . . There is still splendid opportunity . . . "Talk this over with Fleishhacker . . . See if he "is interested going in game with us, otherwise be- "lieve Toronto crowd will back me" (Tr. pp. 107, 108).

Thereafter Dyer returned to San Francisco and later went to Texas and spent five or six weeks on a preliminary trip (Tr. 108).

Later Dyer returned to San Francisco and Doan

on July 18, 1922 (Tr. p. 153) wired Dyer from Seattle:

"I arrive San Francisco Sunday morning. Titus " will not be there until August first. Nothing doing " about Texas until he arrives . . . Do not go " until I arrive."

Bearing in mind Lucey's wire and Dyer's wire and Dyer's return to San Francisco from Texas, why was it that Doan wanted to see Dyer before the latter went back to Texas?

Dyer did wait and reported to Doan that there was a wonderful field over there, and what he had seen and they then and there agreed to go in together in those oil fields (Tr. p. 109).

Later this arrangement of theirs was evidenced by the letter of August 9, 1918, (Tr. p. 111) from Doan in San Francisco to Dyer in Texas.

4. DOAN'S LETTER, dated Aug. 9, 1918.

The next thing that happens, is that Mr. Dyer receives the following letter from Mr. Doan:

"My Dear Tom:

"Recd. your letter of the 4th this morning—with clipping enclosed—I am thoroughly satisfied that there are many opportunities in that country and you are on the right line—It takes big money however to do business . . . I have been think-ink hard about the whole thing—and I have tried to make up my mind what is the best way to handle the situation and I have about come to the conclusion that our first hunch was the best . . .

"I am satisfied Tom that we must first raise at least $100,000.00 before we can expect to do any business—We must have the money first. It is alright to look the field over and get a line on the propositions—but we must have the money . . . As soon as you have some good things lined up so we have something to talk about, we should then get busy and raise the money . . . LUCEY and TITUS will go and we can get others—We must have a FINISHED DEAL so we can act without hindrance or delay . . . I FULLY APPRECIATE ALL YOU ARE DOING. THE INFORMATION YOU ARE GETTING WILL BE VALUABLE—BUT WE MUST GET TOGETHER AND GET THE MONEY" (Tr. pp. 111, 112, 113).

5. DOAN'S LETTER, dated February 15, 1919. This letter was written in San Francisco to B. T. Dyer at Ft. Worth, Texas, and is as follows:

"I will not be able to reach Ft. Worth much before the first of March . . . don't you think it would be a good idea for you to go to Houston and Shreveport (Louisiana) before I arrive—get things lined up in these fields— even if Hoover and Lucey don't come through I can depend on TITUS . . . and will want to look all the fields over and pick something good. . . . WITH ALL THE DIFFERENT LINES WE CAN WORK WHEN WE GET STARTED THERE WILL BE PLENTY FOR US TO DO, AND WE WILL MAKE GOOD" (Tr. p. 218).

DOAN'S LETTER, dated February 10, 1919.

This letter was written to B. T. Dyer at Fort Worth, as follows:

> "Titus will be here to-morrow and I will have a further talk with him. I think he is the only one we can really count on unless Lucey and Hoover are ready to go. . . . I guess WE WILL HAVE TO GO TO THE BAT OURSELVES and when we find something good tie it up. I AM SURE TITUS WILL FINANCE ANYTHING AFTER WE GET IT AND CAN SAY IT IS GOOD. . . .
>
> "WHY DON'T YOU GO DOWN TO HOUSTON AND SHREVEPORT (Louisiana) and get a line up there before I come so we will know where it is best for us to dip in" (Tr. p. 239).

6. DOAN'S LETTER, dated October 12, 1919.

This letter was written by Doan from Shreveport to Mr. Dyer at Ft. Worth, and is as follows:

> ". . . While there is a big boom on here I have not seen anything that I could recommend to your crowd—That we cannot handle ourselves —and as I said before I cannot afford to mix up with you on any OUTSIDE deals in Louisiana— I don't want to be criticized by Titus and Cap Lucey—So I think it the better policy for you to confine your operations to Texas & Oklahoma for the present—If I should start something else here —it would result in hard feelings and I want to avoid that if I can. . . . you cannot expect to make any money if you make a trip to California every 60 days . . . You are needed in Texas

. . . JUST FORGET ABOUT THIS THING OVER HERE—I THINK I AM CAPABLE OF HANDLING IT AND THERE IS NO ROOM AT PRESENT FOR TWO OF US . . .

"NO ONE CAN CRITICIZE YOUR ABILITY OR INTEGRITY—I HAVE DEMONSTRATED MY FAITH IN YOU . . .

"EVERYTHING WILL COME OUT FINE IF WE ALL KEEP OUR NOSE TO THE GRINDSTONE FOR ANOTHER YEAR . . .

"LET ME KNOW FULLY WHAT YOU HAVE IN MIND BY LETTER AND THERE IS ANYTHING TO BE DONE—when I can co-operate I will be glad to do it" . . . (Tr. pp. 130-133).

7. DOAN'S TESTIMONY.

The following is from the deposition of Mr. Doan:

"As a compromise matter I told Dyer that if he would pay me back all his back indebtedness—I needed money at the time—and carry out his agreement with the North Texas Supply Company, that I would carry him providing—for a certain number of shares of stock, if he would discount it 25 per cent, I would carry him for it; but I afterwards withdrew that proposition, because he had not sent me the money he agreed to send me. . . . That was simply a compromise proposition. It was made at Ft. Worth. . . . I waited about thirty days before I withdrew it, to give him a chance to raise the money; he did not do it and I withdrew it. I had another conversation with him and told him the thing was all off, absolutely off, because he had absolutely failed in the first place to carry out his contract" (Tr. pp. 261-2).

8. DOAN'S TELEGRAM.

On May 15, 1919, Mr. Doan sent the following telegram from Shreveport to Mr. Dyer at Ft. Worth:

> "Better go Burke tonight sell both pieces soon as possible also Eastland acreage. Can use money here better advantage. Things looking fine. Keep me fully posted by wire" (Tr. p. 225).

9. DOAN'S LETTER.

On the 23rd day of January (1920) Mr. Doan sent the following letter to Mr. Dyer:

> ". . . If you have to give up one quarter to raise your money I will do it for you on the same basis" . . . (Tr. pp. 196-7).

10. MR. DYER testified fully concerning the relations existing between himself and Mr. Doan and his testimony shows that a partnership must have existed between the parties.

Mr. H. F. Berry testified that he was in Shreveport and met Mr. Doan in January, 1920, and said to him, "Is Dyer interested with you here in your business?" Mr. Doan said: "He is, and I will make him a lot of money" (Tr. p. 82).

F. L. KELLER, testified that he was with Mr. Berry when he had the above conversation with Mr. Doan and heard this conversation (Tr. p. 83).

JACOB BERGER testified that he heard Mr. Doan state in the office of Mr. Berry that Mr. Dyer was interested with him in the Bull Bayou field (Shreveport) (Tr. p. 84).

F. E. COUCH testified that he heard Mr. Doan say:

> "He and Tom were going to make a lot of money down there in Louisiana" (Tr. p. 90).

W. L. LELAND testified that he heard Mr. Doan say:

> "Tom and I are in a way to make a lot of money down there" (Louisiana) (Tr. p. 93).

MESTRE OLCOTT testified that

> "After my arrival in Shreveport on Oct. 1, 1919, I had a conversation with Doan and asked him if Dyer was not coming down to Shreveport with him, and he said that he was going to take care of the Texas end of their business and he was going to take care of the Louisiana end of it" (Tr. p. 99). (Deposition.)

EDWARD J. BUCKINGHAM, (Deposition), testified as follows:

> "I asked if Dyer and himself (Doan) were still partners. . . . and he says, 'Yes we are still associated together; he is taking care of the Texas end and I am taking care of the Louisiana end" (Tr. p. 101).

11. WRITTEN CONTRACT.

A contract entered into by means of letters is a written contract. The text in 13 *C. J.*, pp. 298-9, is as follows:

> "Offer and acceptance resulting in a binding contract may be through the medium of letters, telegrams, or telephonic communications; and in either case as soon as the offer is thus made and accepted, there is a binding contract."

Let us view some of these letters of Mr. Doan in the light of the above text.

J. F. Lucey was the president of the Lucey Manufacturing Company at this time. This was a large concern situated at Pittsburg.

On the 29th day of March, 1918, he sent the telegram to Mr. Dyer set forth in paragraph 3 of this Brief. It will be noted that he states in this telegram that he believes that Dyer and Doan could make a great success, but questions the advisability of Dyer coming alone. He states that it requires two, Dyer and Doan; that the two have the necessary combination of ideas and energy to make good. It will be noted that this telegram was sent to Dyer and not to Doan. It is very likely that at this very time Captain Lucey had it in his mind to form a combination with Dyer and Doan, as he did afterward.

It was the opinion of this man of business affairs that it would require a combination of these two men to make a success.

We next have the letter written by Doan at San Francisco to Dyer at Fort Worth, Texas.

THE LETTER OF AUGUST 9, 1918

From this letter it seems that Dyer and Doan have been talking over the Texas oil field together, and Doan says in this letter that he has been thinking it over and has come to the conclusion that "our first hunch was the best." He further states that WE must raise $100,000.00. It is significant that the letter does *not* state that Dyer must raise $50,000.00 and that Doan must also raise $50,000.00. It states that WE must raise it all, $100,000.00.

He also says that it is all right for Dyer to look over the field, and find "some good things," "to talk about," then "we should get busy and raise the money," Lucey and Titus will go in. He further states that he fully appreciates the work Dyer is doing and that the information will be valuable.

In his next letter (see paragraph 5) Doan says that he can depend upon TITUS. In his next letter he states "I AM SURE TITUS WILL FINANCE ANYTHING AFTER WE GET IT AND CAN SAY IT IS GOOD."

In this same letter he says, "Go down to *Shreveport*" (La.).

According to the text in C. J., cited above, we have here a consistent contract.

It will be noted that these letters outline the terms and scope of the contract and the territory to be covered and Louisiana is one of the States included (Tr.

pp. 218, 239, 241). They name the parties that they have in view, Lucey and Titus (Tr. p. 113). It mentions the amount to be raised $100,000.00, and states who is to raise the money. "WE" are to raise the money. If "WE" are to raise the money and either one of "WE" raise the money, it is the joint act of both. If Doan raises the money after this agreement, Dyer is "WE," as there is a jointure.

This contract recognizes the PARTNERSHIP as actually existing, it is a "WE." Doan testified (Tr. p. 207) with reference to the Lamb Tract: "I told Dyer to go up to Wichita Falls and make a very careful examination of the situation and find out if there was any reason why we should not purchase the property." This contract does not provide that Dyer and Doan will in the future each raise $50,000.00 and then combine the money and make the $100,000.00, and then form a partnership. On the contrary the partnership is formed for the purpose of sending Dyer to Texas and looking up "good properties" and giving them something to talk upon so that they can raise the $100,000.00. By the terms of this contract and the acts and work of Dyer the partnership is actually launched and Dyer and Doan are partners.

The recitals of a contract are conclusive upon the parties to the contract. One of the objects was to raise the money and after this money was raised it was partnership money.

Dyer used his skill in finding the "good properties" and he made no charge for this skill, and Doan used

his skill in finding the money and he could make no charge for this skill.

12. BURDEN OF PROOF.

Counsel contends that the burden of proof is upon plaintiff to establish the fact of partnership by clear evidence, where it is not in writing. In this case the contract is in writing, and in addition, the fact of partnership is established by overwhelming evidence.

13. PARTNERSHIP ESTABLISHED.

From the partnership being established it follows as a matter of law that a fiduciary relation then exists between the parties and they must exercise the utmost of good faith in their dealings toward each other.

Section 2403, C. C., of the State of California provides that in the absence of an agreement on the subject the shares of partners in the profit or loss are to be equal, and the share of each in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss.

Section 2435, C. C., provides as follows:—

> "ALL PROFITS made by a general partner, in the course of ANY BUSINESS USUALLY CARRIED ON BY THE PARTNERSHIP, belong TO THE FIRM."

Section 2436, C. C., provides that a general partner, who agrees to give his personal attention to the business of the partnership, may not engage in any business which gives him an interest adverse to that of the

partnership, or which prevents him from giving to such business all the attention which would be advantageous to it.

Section 2437, C. C., provides:—

> "A partner may engage in any separate business, except as otherwise provided by the last two sections."

Dyer and Doan were engaged in buying and selling and drilling oil lands.

If either of them engaged in that business by law it would be partnership business, by virtue of Section 2435, C. C., and by Section 2438, C. C., the partner must account to the other for such profit.

Louisiana was within the contemplation of Doan and Dyer as expressed by Doan's letters and if Doan engaged in the oil business in that State he must account. The recital in the letter is conclusive as to Doan.

Section 2403, C. C., cited above, recognizes the well known rule enforced by the master in this case.

Titus joined and supplied money in April, 1919, and had supplied $40,000 to the partnership before the Lamb Tract purchase (Tr. p. 214), which was May 5, 1919 (Tr. p. 224, telegram, Tr. p. 210 contract).

Then Lucey at the end of May, 1919, came to Ft. Worth, Texas.

After a conference with Mr. Doan, Lucey indicated that he wanted to start a supply business for his

company at Wichita Falls (Tr. p. 316). He could not establish his company in the name of his concern because of some contract which he had with a competing concern respecting that territory (Tr. pp. 215, 298). He therefore agreed with Doan that if they could get Dyer to act as the president of that company and manage it at Wichita Falls, Lucey would put $50,000 into the partnership (Tr. p. 299). Doan and Lucey talked with Dyer and persuaded him to act as the president of the North Texas Supply Company because that was the only way to get Lucey to join them. So the last of May, 1919, the North Texas Supply Company was organized (Tr. pp. 187, 306). Dyer was made president and the Lucey stock was taken in the name of Doan, Trustee, and thereafter at about the 30th of June, 1919, the Doan Oil Company was organized under the laws of the State of Louisiana (Tr. p. 215) and to the Doan Oil Company was transferred the properties theretofore purchased by Dyer and Doan in Louisiana, Oklahoma and Texas.

Dyer and Doan had many deals together in Texas and Oklahoma.

About the first deal they went into was with reference to some leases in Bosque County, Texas. This concerned about eight or ten thousand acres upon which they made four thousand dollars (Tr. p. 179).

That was in November or December, 1918.

In 1919 Doan had returned to San Francisco (Tr. pp. 180, 210), leaving Dyer in the field. Dyer bought a piece of property from Cockrell in Doan's absence

and paid $250 down on February 22, 1919, and $1,000 on March 1, 1919 (Tr. pp. 160, 161).

This deal netted them without advancing any more money the sum of $7,000 (Tr. pp. 160, 210).

March 14, 1919, Dyer made a deal with Olcott in Eastland County, Texas, and paid $500 down (Tr. pp. 161, 98-99), and the contract was made in Dyer's name (Tr. p. 99).

In the Olcott deal Dyer paid the lawyer's fee of $100 to Cleberg (Tr. p. 163).

Then came the Lamb Tract purchase May 5, 1919, when Doan from Fort Worth wired Dyer to buy the Lamb Tract (Tr. p. 224).

The lawyer's fee in this matter was paid by Dyer (Tr. p. 162).

The money going towards the purchase was secured from Titus (Tr. p. 214).

Also dealt with Jergens (Tr. p. 312).

Also with Archer County leases (Tr. p. 312).

14. BURDEN OF PROOF.

In this action Dyer is claiming that a partnership exists between himself and Doan and is also claiming that the Doan Oil Company is an asset. Doan is denying all this and the burden is upon the complainant, Dyer, to establish these facts. We contend that Dyer has established partnership by the letters of Mr. Doan.

Granted that the partnership is established, then a fiduciary relation exists between the parties and it is

the duty of either of the parties to make full disclosures of all matters pertaining to the partnership and to use the utmost of good faith in their dealings with each other.

We quote the following from *Cox* vs. *Schnerr,* 172 Cal. 371, at page 378:

> "The burden of proof usually rests upon the person asserting fraud, but when one bases a claim upon a contract obtained from a person to whom he stands in a relation of trust and confidence, it becomes his task to prove that he exhibited that uberrima fides which removes all doubt respecting the fairness of the contract. . . .
>
> In every transaction of this kind, one who holds such confidential relation will be presumed to have taken undue advantage of the trusting friend, unless it shall appear that such person had independent advice and acted not only of his own volition but with full comprehension of the results of his action."

If Mr. Dyer had released Mr. Doan from accounting to him for the Doan Oil Company and afterward Mr. Dyer had questioned the transfer and sought to set the same aside, after Mr. Dyer had established partnership, the burden would have been cast upon Mr. Doan, under this decision, to have established the fact that the transfer was fair and just. Mr. Doan took the property of the Doan Oil Company without any contract with Mr. Dyer releasing it. How much more then is the burden cast upon Mr. Doan to show that his claim of ownership is fair and just

and how much more is it his duty to make a full disclosure?

When Mr. Dyer establishes the fact of partnership and that the business of the Doan Oil Company was within the usual business of the partnership of Dyer & Doan he has made his case, and the burden is cast upon Doan to show otherwise.

15. SEPARATE TRANSACTIONS.

Counsel urges that the different transactions were not partnership transactions because they were separate and independent transactions. In paragraph 2 of this Brief we have cited and quoted from *Westcott* vs. *Gilman,* 170 Cal. 562, at page 569, to the effect that a partnership may be organized for one or more transactions or for continuous transactions.

Even if there was anything in the point it would not affect the decision, for the result would be the same. The court would allow an accounting for all the transactions and render judgment accordingly. In this very action the master has allowed the defendant an item of $3,553.47 on a separate and independent transaction: to-wit, the Santa Maria Syndicate. A court would not reverse a judgment for error if there was no injury (Tr. p. 35).

16. MARKED CHANGE.

Counsel states that after Mr. Doan became interested in the Louisiana field there was a marked change in the relationship of the parties.

When the partnership was started and launched, Louisiana was within the contemplation of the parties. Captain Lucey was one of the assets of the partnership, as was Mr. Titus, and more, Mr. Dyer was in the field finding "good things" to talk about. The letters, the contract between the parties, all relate these things. In paragraph 11 of this Brief we have cited 13 C. J. 298-9, to the effect that the terms of the contract cannot be changed by a letter. If they cannot be changed by a letter they cannot be changed by words spoken.

Mr. Dyer was furnishing his money, his skill and labor and time and expense to the partnership upon the recitals of the contract that Captain Lucey and Mr. Titus were to be members of the syndicate and that Louisiana was to be one of the fields. How can Mr. Doan change, by mere word of mouth, the scope of the partnership and the assets after Mr. Dyer has furnished his services?

17. FORFEITURE.

In paragraph 7 we have set forth the compromise that Mr. Doan offered Mr. Dyer. Briefly, it was that he was to pay up all back indebtedness, carry out his agreement with the North Texas Supply Company and give up to him (Mr. Doan) 25 per cent of his stock he would carry him. Then he testifies because Mr. Dyer did not promptly comply with his request, he says that he absolutely declared it all off and forfeited his stock. This is the shortest cut for the

dissolution of a partnership known. Equity will not enforce a forfeiture and will generally relieve from a forfeiture. Mr. Doan injured his case when he related this procedure in a court of equity.

In *Lanpher* vs. *Warshauer,* 28 Cal. App. 457, at page 460, the Court said:—

> "It is urged, however, upon the part of the respondent, that, conceding the existence of such copartnership during the earlier stages of the work upon the premises in question, the plaintiff, by refusing to go on with the work, has waived or forfeited his right to come into a court of equity and have an accounting transaction and to relief in a court of equity. But we do not understand it to be the law either that a partnership is dissolved by the failure on the part of one of the members in some respect to perform his duty or obligation to it; or that he thereby loses his right to come into a court of equity and have an accounting and settlement of the partnership affairs."

In *Whitley* vs. *Bradley,* 13 Cal. App. 720, at page 729, the Court said:

> "But it by no means follows that, because one partner may not put up his share of the capital under an agreement to form a partnership, the combination so formed is any the less a partnership."

In *Kimball* vs. *Gearhart,* 12 Cal. 28, at page 48, the Court said:

> ". . . The facts sufficiently show, . . . that Kimball and Howe were partners in this ad-

venture, with equal rights in the subject of it, and it is evident that the mere failure of one partner to pay his proportion of expenses, or of the debts of the concern, does not forfeit his rights in the common property."

The text in 30 Cyc. 439, is as follows:

"The law does not favor forfeitures, and it does not treat the mere failure of one partner to pay his share of CAPITAL, or of firm expenses, or of firm debts, or to charge himself on the firm books with moneys received on behalf of the firm, as a cause for forfeiting his interest in the firm property. Such a failure may bar him from specific performance of certain provisions of the partnership contract; but it will not justify his co-partners in exercising the powers of a court of equity and ejecting him from the partnership."

18. INDEPENDENT TRANSACTIONS.

At pages 10 and 11 counsel squarely presents the question, can Doan engage in the oil business in the State of Louisiana?

Our answer is that he cannot. That in engaging in the oil business in the State of Louisiana with Captain Lucey and Mr. Titus he violated his contract with Dyer. The letter contract designates the fields of operation as Texas and Louisiana, and designates as persons contemplated to be interested with them as Mr. Titus and Mr. Lucey, and more, the letter asks the aid of Mr. Dyer in raising $100,000.00. With this understanding, Mr. Dyer did his part and Mr.

Doan acknowledged that the information that he furnished was valuable. All these matters are set forth in the letter contract.

Now, Mr. Doan forms the Doan Oil Company in the State of Louisiana and engages in the oil business. Under Section 2435, C. C., this is within the scope of the business to be carried on by Doan & Dyer, and more, he is carrying on business with parties designated by the firm of Doan & Dyer, so this business must be firm business.

More, Mr. Doan was to devote his time to the firm of Doan & Dyer, and here he was devoting all his time to the firm of the Doan Oil Company. Also Mr. Doan ordered Mr. Dyer to keep out of Louisiana. Under Section 2438 Mr. Doan must account to the firm of Doan & Dyer for his interest in the Doan Oil Company. The $100,000.00 that Mr. Doan invested in the Doan Oil Company is an asset of the Doan & Dyer partnership. Titus and Lucey are assets and prospects of the Doan & Dyer partnership. Louisiana and Texas are its field, and the only way that Mr. Doan can change the contract entered into between him and Dyer is by a dissolution and accounting of the assets.

A1. There are two Mr. L. E. Doans. First, there is the Mr. L. E. Doan that counsel is describing to the Appellate Court in his Brief, and whom counsel very concisely presents at page 14 in the following language:

"The uncontradicted evidence supports and cor-

> roborates this testimony which is to the effect that Doan was the 'boss,' dictated the terms of every transaction, advanced the money to acquire the properties, dictated the terms on which they should be sold, assuming the entire risk, and held title to the properties in his own name. . . . But Doan at no time called upon Dyer to share any losses."

This is the same L. E. Doan that was sitting sad and discouraged in his office in the Balboa Building in San Francisco in the fall of 1918 amid the wreck of his Santa Maria Syndicate and writing to Mr. Dyer, who was at Fort Worth, Texas, that he had no money of his own to put into the oil business; that it would be necessary to raise at least $100,000.00. "We must have the money first." He was then asking Dyer to line up "some good things," so that they could raise the money. Mr. Doan, at that time, as he sat there in his office, appreciated the work that Mr. Dyer was doing for him in Texas, at least he wrote that he did. He wrote that he felt sure that he could get Titus, he also felt pretty sure of Mr. Lucey (Tr. pp. 111, 112, 113). The information and the work that Mr. Dyer did for him must have been effective, for Mr. Doan testified, "I think I had about $40,000.00 from Titus before the Lamb purchase" (Tr. p. 214). This was May 5, 1919 (Tr. p. 210).

Now we are ready to take up the Brief of counsel understandingly. After a preliminary statement of the facts of the case, counsel, at page 6 of his Brief, states that the issues are simple and would be easy of

determination were it not for the fact that there is a great conflict in the testimony given by the respective parties.

It will also be noted that in this great conflict of testimony the Court below adopted the testimony of the plaintiff, Mr. Dyer, and gave judgment accordingly. If there is a great conflict in the testimony, as stated by counsel, how hopeful can he be that this Court will disturb the decision of the Court below?

A2. At the same page counsel states that Mr. Dyer was connected with the North Texas Supply Company and the American Oil Engineering Company, and that during all of this time Mr. Doan, independently of Dyer, devoted his entire time and attention to developing properties which Messrs. Titus, Lucey and himself had acquired in Louisiana, in which Doan invested $100,000.00 of his "own funds."

In paragraph A1 of this Brief we have endeavored to set forth just how his "own funds" were obtained.

Counsel, in this paragraph, says that Doan acted "independently" of Dyer.

Doan was not acting independently of Dyer for the reason that Doan told Dyer to turn in a bill against the Doan Oil Company for the expenses that had been incurred regarding the acquiring of the Oklahoma property (Tr. p. 237). In addition to this we have already referred to two letters wherein Mr. Doan requested Mr. Dyer to visit the Louisiana field and report to him. In addition to this, on October 12, 1919, Mr. Doan wrote from Shreveport to Dyer at

Fort Worth a letter in which he said, "I cannot afford to mix up with you on any outside deals in Louisiana. I don't want to be criticized by Titus and Cap. Lucey." It is significant that Mr. Doan did not say that he did not want to be mixed up with Mr. Dyer on any deals, as that would exclude the Doan Oil Company. The intention was not to exclude Mr. Dyer, but that all deals must be handled through the Doan Oil Company, in the Louisiana field. In this same letter Mr. Doan says: "Just forget about this thing over here—I think I am capable of handling it and there is no room at present for two of us." This is an admission on the part of Doan that Dyer has an interest in this company. He asks Dyer to forget it, not because Dyer has no interest, but because Doan is capable of managing it. He does not say that there is no room there for Dyer; on the contrary, he says there is no room at present, implying that there may be after a while. The very act of writing Dyer not to come to Louisiana shows that there is some connection between the parties.

A3. If the parties were independent of each other there would be no such communication between them. It was by virtue of this connection between them that Doan gave this order, and this connection was the partnership relation. If these parties were acting independently and Mr. Doan were to write such a letter it would be an insult and there is no reason to believe that Mr. Doan intended to order Mr. Dyer to keep out of Texas; on the contrary, he requests him

to let him know by letter what he has in mind. Lastly, Mr. Doan testifies that he makes a proposition to Mr. Dyer which he calls a compromise, to allow him one-half of the stock in the Doan Oil Company on certain conditions (Tr. pp. 190, 195-6). Mr. Doan certainly would not give up 50,000 shares of Doan Oil stock for $1.00 per share when this same stock was worth several dollars per share. There is no evidence to sustain a finding that Mr. Doan was acting independently.

The evidence that sustains a finding that the $100,000.00 was Doan's own funds, is the following: There is the above testimony that he received $40,000.00 from Mr. Lucey and there is the admission in the letter that he had no funds to invest and was asking Mr. Dyer to send favorable reports of the oil fields so that they could raise money. Mr. Doan does not make a full disclosure as to the source of his moneys, as he should do, since he is occupying a fiduciary relation to Dyer. In the absence of a full disclosure the presumption of law will be against Mr. Doan.

THE AGREEMENT INTERPRETED IN THE LIGHT OF THE PARTIES' CONDUCT

A4. Under the above heading, at page 8, counsel states that the acts of the parties were several "independent joint ventures" and that there was no partnership between the parties. Under this heading counsel states that Doan was the principal in each

transaction, and supplied the capital. That he dictated the terms of purchase and sale, fixed the purchase price and the sale price and determined all questions of policy; that Dyer was compensated for services rendered in these transactions by a division of commissions or profits earned. Counsel then argues that Dyer was an agent, and was in no sense a partner.

Counsel then states that Doan bought the property in Bosque County, Texas, aggregating 8,000 or 10,000 acres, and paid the seller out of his own funds 50 cents per acre; that he took the title in his own name; that Dyer sold these leases under a power of attorney, which Doan had given Dyer. That Doan agreed to divide the profits with Dyer. Counsel then goes and cites several similar transactions and then calls these separate independent transactions and states that there was no partnership.

Counsel cites the Burke-Burnett Tract at Wichita Falls, the Tillman County lease, and states that all these transactions were paid for by Doan, except in some cases the initial payment, attorneys' fees and the like. The only payments that were made in some cases were made by Dyer. Then counsel makes the statement that Doan was the "boss"; that he assumed all the risks and paid all the losses, and did not call upon Dyer to share any of the losses. There were no losses ever.

In paragraph A1 we have attempted to show how and why Doan was the "boss," if he was, and why he paid for all the properties, which he did not.

Dyer went to the Texas oil fields and reported to Doan all the valuable prospects he could find and Doan remained in San Francisco, and by the use of this information secured the money from Titus and Lucey, and never made a disclosure of where he secured all this money. That was the reason why the titles were taken in the name of Doan and why Doan paid for the properties. He had all the money of the partnership. None of these acts were independent, there was a connection between all of them and the connection was that the funds, the $100,000.00, or whatever the amount was, were the partnership funds of Dyer & Doan, and were raised by their joint effort, Dyer in the field and Doan in the office.

As a matter of fact, Doan never put up a dollar of his own money after he got money from Titus the first part of April, 1919. Lucey and Titus put up. Doan played dead safe. (See Tr. pp. 331-332 and 339-40-41.)

A5. Counsel next contends that either Dyer was an agent of Doan, or that they were joint adventures in separate and distinct transactions, and that this position is fortified by the fact that Doan made several separate transactions on his own account, and that Dyer made no objection. Special reference is then made to the Wehr-Haywood Syndicate in which Doan invested $1,000.00. It appears from Doan's testimony that, "nothing was ever said whether he was interested or not" (Tr., p. 185).

W. L. LELAND TRANSACTION

The testimony shows that Leland brought a piece of property to Doan & Dyer. Leland wanted some assistance. That Doan said he did not want to go into anything with Leland. Thereupon Dyer loaned $2000 to Leland. Later on Leland wanted Dyer to take an interest in the property for the loan. Dyer had to acquire a small interest in a deal with Leland, one-half of which he sold to Delaney for one-half of what he loaned Leland (Tr., p. 124).

Counsel then states that Dyer had an independent transaction with W. L. Leland and did not account to Doan.

W. L. Leland testified that he understood that Dyer sold out for the same price that he paid him (Tr., p. 94).

A6. *Dennis* vs. *Gordon,* 163 Cal., 427, bears a close resemblance to the case at bar. Dennis and Gordon were partners, doing business under the firm name of Dennis-Gordon Company. There was no capital; its business was buying and selling of oil—oil lease and real estate, either for others or on commission—and the promoting of oil companies and oil lands. There was no agreement that either should contribute money to the business. Necessarily, the transactions would be separate and distinct, just as in the case at bar. Under these circumstances Gordon went into a deal in oil lands which, of course, was

within the scope of the ordinary business carried on by the parties and refused to account to Dennis. The Court said:

> "Gordon informed Dennis of this proposition, stating to him that the land had to be developed; that it was Government land not proved up; that it was a wildcat proposition, and very much of a gamble; that it would take $1000 if they went into it together; and proposed that if he would go in for one-half of it they would take it for the firm. Dennis refused to go into it; that he was without funds to invest in it himself, and that he would not go into anything in which McLeod was interested. . . . The four then began the erection of derricks for drilling. . . . These were the services referred to as part of the consideration given by Gordon for the property. It does not appear that much of Gordon's time was spent therein or that it seriously interfered with his proper attention to the affairs of the Dennis-Gordon Company. . . . Oil was found. . . . The services of Gordon in this enterprise were all performed after he had made the proposal to Dennis above stated, and after Dennis had refused to go into it. If this refusal was not procured by concealment or misrepresentation, the consent of Dennis that Gordon might go into it on his own account, and his refusal to allow the firm to take a part in it, would estop him from claiming that Gordon's subsequent reasonable attention to the new enterprise, not materially interfering with his attention to the firm business, should nevertheless inure to the benefit of the firm."

Page 433.

"The relation between partners is confidential. . . . In the conduct of the business each must act in the highest good faith toward the other, and may not obtain any advantage over him by the slightest misrepresentation or concealment. . . . A general partner who agrees to give his personal attention to the partnership business may not engage in any other business which gives him an interest adverse to that of the firm, or which prevents him from giving to the firm business all the attention which would be advantageous to it (Sec. 2436). Except as thus bound he may engage in any other business without being accountable to the firm for the profits thereof" (Sec. 2437, 2438).

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"McLeod offered Gordon a one-fourth interest in this contract with the locators, for the sum of $2100. He also offered to loan Gordon the money to pay this interest. Gordon informed Dennis of the offer of the interest and proposed to let him in on the deal on the same terms, but he did not say anything about McLeod offering to loan him the money. . . .

As a partner of Dennis he was under no obligation to use his own credit in borrowing money to loan to Dennis to enable Dennis to go into the deal either as a member of the firm or on his own account. . . . If he had advanced such money, the transaction would have been an individual matter between them and not a part of the firm business. . . . So far as he appears to have been concerned with it, the business was in no wise adverse to the interests of the firm. No reason appears why he could not buy an interest in it without taking it as firm property."

A7. From this case it appears that where a partnership exists, as in the case of Dyer and Doan, and anything within the scope of the business is offered to one of the partners, it is the duty of this partner to present it to the other partner and to make a full disclosure to the other partner, and if the proposition is turned down by the other partner, then the first partner may invest his private capital in the proposition. But before a partner can invest his own money in any such property he is duty bound to give the firm a first chance to take up the proposition.

Doan pretends that the Doan Oil Company is a separate and independent venture and that there is no connection with Dyer and this investment. There are two reasons, as stated in the *Dennis* case, why Dyer is interested in this Company; first, Doan invested funds in this Company which were raised by the aid of Dyer, and secondly, the business of the Doan Oil Company was in the same line as the business of the Doan & Dyer Company, and each of the partners had agreed to devote their time and attention to the Doan & Dyer Company.

In *Dennis* vs. *Gordon,* 163 Cal., 427, the Court said it was not incumbent upon one partner to advance money for the benefit of the other, where there was no capital stock; the rule would be different where there was a capital stock, as in the case of the Doan & Dyer Company. If a good prospect was presented to Mr. Doan in the State of Louisiana, whether or not there

was a capital stock, it would be the duty of Mr. Doan to get the refusal of Mr. Dyer before he could invest his own money in the prospect. If there was a capital stock, or if Mr. Dyer was willing to put up his own money, Mr. Doan could not invest his private funds in the project and then claim it as his individual property.

LOUISIANA

Referring to Appellant's Brief at page 16 to the relationship of the parties from May 30 to March 22, 1922, counsel say there was a marked change in the relationship between the parties from the time Doan began operations in the State of Louisiana.

In saying this they are in error.

April 10, 1919 (Tr., p. 331), was the first payment on Louisiana property, and from that time on Dyer was as much interested as Doan in Louisiana (*Clark & Greer,* Tr., p. 221).

It has been shown by disinterested witnesses that Dyer was interested with Doan over in Louisiana and Dyer also so testified. The whole course of dealing between the parties conclusively shows that Dyer was interested in Louisiana.

How can the following be explained otherwise?

On May 15, 1919, from Shreveport, Doan wired Dyer at Fort Worth, "Better go to Burke tonight; sell both pieces soon as possible, also Eastland acreage.

Can use the money here to better advantage. Things look fine" (Tr., p. 225).

Again on May 16, Doan wired Dyer, "We have bought several pieces. Will tell you details later this week. Like Shreveport as best place to do business" (Tr., pp. 225, 226).

On May 18, Doan wired Dyer from Shreveport, "We have made big purchases here of wonderful properties and need the money" (Tr., p. 226).

On June 11, 1919, from San Francisco, Doan wired Dyer, "Leaving for Shreveport Sunday night. Have arranged everything satisfactorily. Glad to hear good news" (Tr., p. 227).

Dyer testifies that this telegram from Doan was with reference to the Giffin well in Louisiana (Tr., p. 306).

And on June 17, 1919, from Shreveport, Doan wired Dyer, "Giffin well completed. Looks fine. Hundred barrels. Everything in all fields looks encouraging" (Tr., p. 228).

On June 24, 1919, from Shreveport, Doan wired to Dyer, "That well came in as a big gasser. No oil yet. Don't look good."

On June 25, 1919, from Shreveport, Doan wired Dyer, "Titus and I have bought eighty acres of good stuff" (Tr., p. 231).

On July 7, 1919, from Shreveport, Doan wired Dyer, "Giffin well pumping over one hundred barrels. Hard cash offered for twenty-five thousand for

Bull Bayou forty. We are putting up rig there now. Also drilling the second well on Giffin lease in the morning. . . . Everything fine here" (Tr., p. 231).

On July 8, 1919, Doan wired to Dyer at San Francisco, California, "Well on adjoining forty Bull Bayou flowing over a thousand barrels from top of sand. Our ten-inch casing cemented today. . . . Everything going fine here" (Tr., p. 233).

Doan testifed: "The Clark & Greer well is the forty-acre tract that I purchased in Louisiana and upon which I made the first payment April 10, 1919" (Tr., p. 233).

On July 18, from Shreveport, Doan wired Dyer at San Francisco, as follows: ". . . Drilling at Bull Bayou big well just in near southeast corner of Pine Island lease which absolutely proves all of it. . . . Come soon as possible" (Tr., p. 234).

July 28, 1919, telegram from Doan at Shreveport, to Dyer at Fort Worth, "I will be here balance of week. Everything going fine" (Tr., p. 235).

Telegram August 12, 1919, Doan, Shreveport, to Dyer, Fort Worth, "Have made arrangements to leave here tomorrow night; going to southern Louisiana to look over some leases" (Tr., p. 235).

Telegram August 29, 1919, Doan, from Shreveport, to Dyer at Wichita Falls, "McDevitt says our forty in Oklahoma is sure to come in. Better stop sales at low prices until we have time to investigate" (Tr., p. 236). This refers to the Tillman County Couch purchase.

Letter from Doan at Shreveport, to Dyer, Fort Worth, dated September 1, 1919, "We are drilling three wells now. Will start another one next week, possibly two wells. Before these wells are completed with all equipment, tanks, standard rigs, etc., they will require an outlay of nearly one hundred thousand dollars. After they are completed I hope we will have production enough to take care of our future development so that we will not be in need of any more money.

"I made a sale today of 1500 acres of our Bull Bayou wildcat for $12,500. The parties purchasing will drill and prove it up for us. This will leave us over a thousand acres in the clear. The Bull Bayou well is going rather slowly on account of the strong gas pressure. They promised, however, to set the six-inch pipe some time this week, and it will be a matter of two weeks after that before the well is completed" (Tr., p. 241).

Letter from Doan at Shreveport, to Dyer, Fort Worth, dated September 16, "I wrote you yesterday we are held up for a day or two in finishing our well on account of freight congestion. Will let you know as soon as we get going . . ." (Tr., p. 243).

Letter dated September 20, 1919, from Doan at Shreveport, to Dyer, Fort Worth, ". . . It is raining here today and if it keeps up I don't know whether we will be able to see our No. 1 Pugh well brought in or not" (Tr., p. 244).

long to us. I am endorsing same to the Doan Oil Company. The balance of this lease was sold in two pieces. The remaining fifteen acres has been sold and a payment is up on it" (Tr. p. 198).

W. L. LELAND testified: "I had conversation with Doan respecting Louisiana at Fort Worth. Sometimes Dyer was present. . . ." (Tr. p. 92).

"Shortly after Doan made his trip to Louisiana, when he bought the forty acres from Greer and Clark, then on subsequent trips he made down there I had conversations from time to time with him referring to Louisiana property. It was pretty early in April when he made the first purchase. He showed me maps when he came back. He suggested I buy an adjoining piece and I went down and looked at the land. . . . The first conversation, I think, was in the morning he returned from Louisiana back to Fort Worth. . . . Doan said, 'Tom and I are in a way to make a lot of money down there'" (Tr. p. 93).

F. E. COUCH testified: "I had several conversations with Doan respecting Dyer in Louisiana at different times. I remember I talked with him in July and August; he had been down to Louisiana on several trips. This was in 1919. . . . I remember that in one conversation he stated that he and Tom were going to make a lot of money down there in Louisiana" (Tr. p. 90).

JACOB BERGER testified: "Mr. Doan brought maps up to C. J. Berry's office to make us familiar with the

Louisiana oil field. . . . We were looking the maps over and I asked him if Mr. Dyer was interested in the oil business with him. He said he was. The maps were of the Bull Bayou field. It was a few miles out of Shreveport.

"Later I asked him if Mr. Dyer was interested in this particular production. He said he was" (Tr. p. 84).

F. L. KELLER testified: "I was present when Mr. Berry asked Mr. Doan at Doan's office in Shreveport where Tom Dyer was. Mr. Doan said he is up at Wichita Falls running the Supply house. Mr. Berry said, 'Well, is he in with you here in the oil business?' Mr. Doan said, 'Yes, and I am going to make him a lot of money' " (Tr. p. 83).

H. F. BERRY testified: "Between January 20 and 25, 1920, at Mr. Doan's office in Shreveport I had a conversation with Mr. Doan. . . . I said, 'Is Dyer interested here with you in your business?' Doan said, 'He is, and I will make him a lot of money' " (Tr. p. 82).

Again a few days later at Mr. Doan's office at Shreveport, in the presence of Mr. Berger and Mr. C. J. Berry, Mr. Berger asked Mr. Doan if Mr. Dyer was his partner down there in the oil business, and he said he was (Tr. p. 82).

MESTRE OLCOTT testified: "After my arrival in Shreveport on October 1, 1919, I had a conversation with Doan and asked if Dyer was not coming down

to Shreveport with him and he said that he was going to take care of the Texas end of their business and he was going to take care of the Louisiana end of it (Tr. p. 99).

EDWARD J. BUCKINGHAM testified: "About a year ago I had a conversation with Doan at which Dyer and some other men whose names I don't remember were present in the dining room of the Fort Worth Club. Dyer spoke to us with reference to some land which he said he and Doan had in Louisiana and he said they had a 320 acre tract which was about three or four miles from a tract of land which they had secured and a well had just come in. . . . He said he was not familiar with it and he wanted me to come down and meet Mr. Doan in the evening, and we went down and had a talk over it with Doan (Tr. p. 100).

"Later in February of this year I asked Doan if Dyer and himself were still partners and Doan said, 'Yes, we are still associated together; he is taking care of the Texas end and I am taking care of the Louisiana end'" (Tr. p. 101).

L. E. H. DE SALLIER: "Doan stated in regard to the lands in Tillman County that he could not reach any decision and for me to see Dyer, his partner, at Wichita Falls (Tr. p. 101).

"Doan stated that with regards to that land, he did not wish to make any price—set any price for sale until he had consulted Dyer" (Tr. p. 102).

A. P. JERGENS testified: "I had a conversation with Doan regarding Louisiana at about the time that Dyer was organizing the Supply Company at Wichita Falls during the year 1919. Conversation took place in the room of Doan and Dyer. Doan, Dyer and myself were the only persons in the room. Doan had returned from Louisiana. He had a map of the oil fields and we were talking about conditions there, and I put the proposition up to him whether or not he wanted me to come in on it, and he said, 'Well, I think we have got it all financed. . . . Here is where we are going to make a clean-up,' and that they had been offered a profit on one of the tracts that he had acquired. As to the names, he said that were financing it to the best of my recollection he mentioned the name of Mr. Lucey and someone else" (Tr. p. 104).

"In the conversation with reference to Louisiana, I asked Doan if I could not get in on it, and he said, 'I think we will get the matter all financed.' He said, 'Lucey and Titus are coming in with us and I think we won't need any more money'" (Tr. p. 105).

JOSEPH MARTIN testified: "I remember some conversation with reference to some oil tank cars about May, 1919.

"Doan said, 'Some time you will see Doan and Dyer's name on the cars for the oil that came out of Burke Burnett field.' That is in Burke Burnett, where they had some property" (Tr. p. 292).

LESLIE J. COGGINS testified: "I know Doan and Dyer. I saw them in Texas in 1919, in May. Mr. Martin and myself met them at Wichita Falls. They said they owned a five acre tract there. Mr. Doan or Mr. Dyer said, 'Well, Mr. Martin, some day—you see those tank cars over there?—you will see our names on them, "Doan & Dyer"; we will get it right up here in this little field'" (Tr. p. 204).

SANTA MARIA-DOAN SYNDICATE

Doan's testimony is that Dyer owed him money on the Santa Maria wells. That Doan demanded it of Dyer. That Dyer never requested a statement (Tr. p. 223).

Dyer's testimony is as follows:

"Doan never made any demand on me on the Santa Maria account until the telegram of December, 1919" (Tr. p. 302).

That telegram was from Shreveport to Dyer in New York, and is dated December 9, 1919 (Tr. p. 159), and is as follows:

"I have obligations to meet January 1st. Can you send me six thousand dollars advanced by me your account Santa Maria well. Answer."

Dyer continues: "I had several talks with Mr. Doan and offered to get the money to pay him (Tr. p. 302). He told me that he was selling off the salvage and there would not be a great deal, and leave

the matter until the salvage money had come in and when that was cleared up he would give me the amount; that it would not amount to very much and he would let it run that way" (Tr. p. 302).

Dyer from New York answered Doan's telegram as follows:

"December 19, 1919.

"L. E. Doan,
Shreveport.

Your wire nineteenth received just as I am leaving for California. I will arrange Santa Maria obligations from California if I am not in Texas before, but ask you to send statement Van Nuys Hotel to meet me if possible in time. Did you close Santa Maria account since salvage? This was not done our last talk on this. At same time will you have Doan Oil Company statement Van Nuys for me and also your and my joint account regarding Doan Oil Company and Louisiana. Will be glad settle both accounts if you wish. Try have this for me so I can meet your request. Will be Van Nuys for Christmas and keep touch with you" (Tr. pp. 293-4).

This telegram was not answered and on December 29, 1919, Dyer from Los Angeles telegraphed Doan at Shreveport:

"Received no word or Santa Maria information at Los Angeles. Will fix this up if you can send it here" (Tr. p. 294).

The Santa Maria statement was not sent to Dyer and the other people interested in that matter until long afterwards.

This Doan Syndicate—Santa Maria well—statement was *not* submitted until September 22, 1920, from Shreveport, Louisiana, to Dyer. "I am enclosing you herewith final statement of the Doan Syndicate at Santa Maria . . ." (Tr. p. 265).

The statement follows and is dated September 15, 1920 (Tr. pp. 266, 267).

In this connection in Doan's statements that Dyer owed him money on Santa Maria and that he had demanded it, see letter from Dyer to Doan dated Ft. Worth, January 10, 1920 (Tr. p. 252).

"I do not know the Santa Maria books at all."

Showing that in December, 1919, when the telegrams above mentioned were sent, Doan was looking for the Santa Maria books and that it was not until months afterwards and, in fact, after this litigation started that he submitted to the members of the syndicate a statement of that operation.

And to that point Mr. Doan testified (Tr. p. 342) as follows:

"The Doan Syndicate deal referred to in this account refers to the Santa Maria properties referred to in the trial. I delivered to Dyer an accounting of the Santa Maria property several months ago, *I think before this suit was started.*"

Inasmuch as the answer was sworn to on the 22nd day of June, 1920, Mr. Doan was mistaken (Tr. p. 14).

DOAN testified: "I stated those things to Dyer at Fort Worth on January 21, 1920. I fix that day because Dyer gave me a check for $3000 in payment . . . That was with reference to the Santa Maria well and was money that I had advanced for Dyer on the Santa Maria well, a California proposition. He had never requested from me an opportunity to pay it before or a statement from me so that he could pay it" (Tr. p. 223).

"You have never offered to do it" (January 21, 1920) (Tr. p. 193).

This testimony of Doan's is, of course, in direct conflict with the telegrams of December 19, 1919 (Tr. p. 293), and that of December 29, 1919 (Tr. p. 294). Doan also testified that in San Francisco in November, 1919, Dyer insisted on a settlement (Tr. pp. 404-405).

DYER testified: "I was willing to put up my equal "share at any time . . . but Doan told me, 'Just "let it ride the way it is.' They were going to re-"organize" (Tr. p. 387).

GENERAL PETROLEUM CORPORATION

A contract was entered into on the 16th of April, 1920, between the Doan Oil Company, a corporation, first party, and L. E. Doan and Louis Titus, second parties, and General Petroleum Corporation, third party.

This recited the ownership by first party of the Pine Island lease, and that the second parties own or con-

September 22, 1919, telegram from Doan at Shreveport to Dyer, Fort Worth, "Well will be drilled in tomorrow, but heavy rains make it impossible to go. Would like for you to come anyway" (Tr., p. 237).

Telegram from Doan to Dyer, dated October 7, 1919, "Well has dropped to 500 barrels . . ." (Tr., p. 237).

Telegram dated October 11, 1919, from Doan at Shreveport, to Dyer, Fort Worth, "Big well down to 250 barrels. Will take drill stem out next week and see if can bring it back. So much rain here impossible to get anywhere or do anything" (Tr., p. 238).

Letter, October 25, 1919, "I have written Titus about the American Oil Engineering Company. A little later on after our wells on Section 6 are completed, we may take it up with them. But I don't want you under any circumstances to mention it until we are ready to talk business because I will have to go over the matter fully with Titus before I can offer anything. . . . The well has come in across the river near some of the wildcat acreage in Bull Bayou —better than 200 barrels. I may sell some for from one hundred to two hundred" (Tr., pp. 246, 247).

Letter from Doan to Dyer of October 27, from Shreveport (Tr., p. 248), "I am leaving Wednesday from Washington. Had a wire from Titus this morning to meet him and Captain Lucey. We will discuss income tax and decide on whether it will be advisable

to sell everything. . . . Will let you know soon as I return what we decide on. We cannot offer anything until the wells on the eighty are completed. This will be after November 15.

"Our No. 1 well is down to a hundred barrels . . . I don't expect over 500 barrels . . . don't make any overtures to anybody about a sale of the property until you hear from me, as it might interfere with Titus' plans. I don't know what his ideas are, but I think I have convinced him that we should sell some of our properties" (Tr., p. 248).

Telegram from Doan, Shreveport, to Dyer in New York, December 17, 1919, "Tested No. 1 Nelson well 2756 feet. Plenty of oil, but not sufficient gas to flow. Am drilling deeper. No. 2 Pugh flowing 300 barrels. Otherwise nothing new" (Tr., p. 239).

Appellant's Brief at page 42 says, "A partnership relating to the Louisiana operations cannot be proved unless Messrs. Lucey and Titus are included as members of the partnership."

The very first letter of Doan's, after Dyer and he had agreed to go in together in the southern field, and written on August 9, 1918, says, "Lucey and Titus will go and we can get others" (Tr., pp. 111, 113). That includes them, and it is from Doan.

On February 10, 1919, Doan, in another letter, says, "Titus will be here tomorrow and I will have a further talk with him. I think he is the only one we can really count on unless Lucey and Hoover are ready

to go. . . . I guess we will have to go to the bat ourselves and when we find something good tie it up. I am sure Titus will finance anything after we get it and say it is good. If Titus is still anxious to form a company I will try to get some others in, but if he is not anxious, I will drop the matter until we have something lined up" (Tr., pp. 239, 240).

On February 15, 1919, following, Doan wrote Dyer, "Even if Hoover and Lucy don't come through we can depend on Titus. We will want to look all the field over and pick something good. We cannot hurry and will not lose anything by waiting" (Tr., p. 218).

This was followed up and Titus gave Doan $40,000 before the Lamb purchase which was on May 5, 1919 (Doan's testimony, p. 214).

Regarding this Lamb tract Doan testified, "With reference to the Lamb tract, I told Mr. Dyer to go up to Wichita Falls to make a very careful examination of the situation and find out if there is any reason why we should not purchase the property . . ." (Tr., p. 207). Doan tries to blame Dyer on this purchase, but see his wire, "Do not lose Lamb piece" (May 5, 1919, Tr., p. 224).

A. S. LEACH testified, "I know the Lamb tract. I know that Dyer and Doan bought it about the time that I met them. Doan talked to me, in a general way, about the land before the final payment was made (Tr., p. 95).

Afterwards I made a deal on it, or they made a deal on it through me. That deal must have been along in the fall, a few months after they purchased it. . . . I handled eighty acres of land in Tillman County in April, 1919. I made the deal with Couch. Couch agreed to take it and then told me that Doan and Dyer were coming in with him on the purchase. . . . I talked to Doan about that. I dealt mostly with Couch and Dyer about it" (Tr., p. 96).

The first investment in Louisiana was April 10, 1919 (Tr., p. 331). Later came the investment in Burke Burnett of the five-acre Lamb tract about May 5, 1919 (Tr., p. 224), and the purchase about May 7, 1919, of a half interest in eighty acres in Tillman County, Oklahoma (Tr., pp. 183, 184).

In May, 1919, Titus came to Fort Worth and Doan, Dyer and Titus made a tour of the Burke Burnett, Oklahoma fields and later and towards the end of the month of May, 1919, Lucey came to Fort Worth in company with Doan and they two having talked the matter of a supply company over among themselves, then proposed to organize the North Texas Supply Company to be located at Wichita Falls, Texas, so as to make a place for Doan's son.

The Lucey Manufacturing Company could not engage in business in that territory because of a contract with the Continental Oil Company (Tr., pp. 215, 298, 300).

Lucey proposed that Dyer be made the president.

Lucey testified, "I picked out Dyer, it was my suggestion and not Doan's suggestion to me" (Tr., p. 316).

Dyer, to Lucey and Doan, absolutely refused to go into the supply business (Tr., pp. 298, 187). Thereupon Doan requested Lucey to retire so that he could speak to Dyer alone. Doan then told Dyer that if he would take the presidency of the North Texas Supply Company Lucey would put $50,000 in with them in Shreveport, and that money was needed at Shreveport (Tr., p. 299).

Therefore, in order to get Lucey in, Dyer agreed to head the North Texas Supply Company (Tr., p. 299).

Dyer testified that no such conversation occurred as stated by Doan respecting Dyer's getting money from the California Syndicate, taking in the North Texas Supply Company, organizing the drilling companies, and devoting all of his time to the North Texas Supply Company (Tr., pp. 309, 310 top).

Captain Lucey suggested that it would possibly be a good plan to let some contractors have rigs on a fifty-fifty basis and Dyer says when the rig did come in it was turned over to a man named by Captain Lucey who made a failure of it, and that no success could be made with a drilling company or a rig company at that time because the Commission would not allow people to bring the wells in and the contractors lost money (Tr., p. 310).

However, the matter of Lucey coming in depended also on Titus subscribing to stock in the North Texas Supply Company.

(See telegram of June 2, 1919, from Titus in Washington to Doan at Fort Worth.) "I am very glad to have Lucey subscribe $50,000. His first $25,000 must be in your hands in Shreveport in time for $50,000 payment on Pine Island property. I will subscribe ten thousand to a supply company. . . . Is it not feasible to organize a company on usual basis and sell enough stock to at least drill a well?" (Tr. p. 253).

Later, on June 30, 1919, in accordance with the arrangement made by Titus to Doan, Lucey and Dyer, the Doan Oil Company was organized (Tr. pp. 215, 169).

PROPERTIES THAT WENT INTO THE DOAN OIL CO. AT PAR

About the time of the purchase of the Lamb tract (five acres Wichita County, Texas, at Burke Burnett), Couch testified: "I told Dyer I had bought some acreage over there (Tillman County, Oklahoma), and that if he and Doan wanted half of it they could have it. Dyer told Doan over the telephone that I told him they could have it, and he said that it was all all right" (Tr., p. 91).

"I told Dyer that if he and Doan wanted to share in the purchase of this it was all right with me" (Tr. p. 87).

"This land cost between $8000 and $9000" (Tr. p. 87).

"A little over $4000 for each half. The early part of June I paid back $5387.50 on this purchase, which left forty acres" (Tr. p. 88). Thus showing a profit to Dyer and Doan of over one thousand dollars and with forty acres left.

"Both of these tracts, i.e., the Lamb tract, five acres, Tillman County, Oklahoma, lease were by Doan, with the consent of Dyer, conveyed to the Doan Company" (Tr. pp. 184, 221). Does this look as though Dyer was interested?

On page 13 of their Brief, counsel say the attorney's fees for passing title on the Tillman County, Oklahoma leases, amounting to $25, were paid by Dyer and that the account rendered by Dyer to Doan also shows that Dyer held in his possession $2092.50, representing the commission of the amount received from the sale of this property, but does not explain that transaction, nor that there was still a balance due Dyer. This account is set forth at page 164 of the Transcript, dated August 29, 1919, as to the Doan Oil Company, and in the letter from Dyer to Doan, February 9, 1920 (Tr. p. 198).

DOAN testified: "I told him to turn in a bill against the Doan Oil Company for the expense that he had incurred in regard to the acquiring of the Oklahoma property and the Burke Burnett property" (Tr. p. 237).

The bill at page 164 of the Transcript is the bill

presented by Dyer. It contained an item for Dyer's one-half interest in the firm automobile. Doan testified:

"The automobile I turned over to the Doan Oil Company and they gave me credit for the full amount" (Tr. p. 346).

The amount for which Doan received credit on this automobile was $2665 (Tr. p. 339).

The automobile was owned by Dyer and Doan, and when Dyer was in San Francisco Doan took the automobile from Fort Worth over to Shreveport for the Doan Oil Company (Tr. p. 232).

On July 14, 1919, Doan wired from Fort Worth to Dyer in San Francisco: ". . . Will drive car Shreveport tomorrow. Need it there" (Tr. p. 232).

This was fourteen days after formation of Doan Oil Company (Tr. p. 215).

"In the same connection the car referred to is the automobile that Dyer and I purchased in Fort Worth" (Tr. p. 233).

The amount held by Dyer in his own possession, $2092.50, representing the portion of the amount received from the sale of this property (Tillman County) is shown by the letter dated February 9, 1920, Dyer to Doan, as follows:

"Mr. Couch had given me a check for $2700, which was one-half on the selling price of twenty acres out of the Tillman County property. As I understood it, this went into the Doan Oil Company. Will you please advise me if this is correct? If not, it will be-

trol 50 per cent of the first party's stock, and therefore *first* party hereby grants to the third party the right or option for a period of eight months to purchase the lease of the property hereinabove described for the sum of $2,000,000.00, payable $50,000.00 in cash and $1,950,000.00 in shares of the capital stock of the General Petroleum Company . . . Second parties grant third party the right to purchase 50 per cent of the capital stock of first party for eight months. . . .

Third. Third party agrees to pay second parties $50,000.00 in cash and $200,000.00 in stock of the General Petroleum Company at $200.00 per share.

Fourth. Third party is granted the right to drill three wells on the lease (Tr. p. 369).

This $50,000.00 was paid to Doan and Titus and the stock was delivered to them. On May 8, 1920, L. E. Doan and the Doan Oil Company, by L. E. Doan, president, addressed to the General Petroleum Company a letter with reference to the division of the stock and this stock was divided among the then stockholders of record of the Doan Oil Company (Tr. p. 373), as per that letter. Of course, this General Petroleum money and stock belonged to the stockholders of the Doan Oil Company.

LOUIS TITUS

Mr. Titus testified that he had a conversation in July, 1919, with Mr. Dyer and there is a conflict between Mr. Dyer and Mr. Titus as to what occurred.

EDWARD EVERETT

Edward Everett testified (Tr. p. 293) that he was present when Mr. Dyer called Mr. Titus up in December of 1919, and that is the time that Mr. Dyer says he had the conversation, and we urge that Mr. Titus is mistaken as to the time the conversation occurred.

THIRTY-THREE THOUSAND SHARES

On the 10th of November, 1919, Messrs. Doan, Lucey and Titus got together at Shreveport and had a meeting of the Doan Oil Company.

A resolution was adopted in substance that the company offer for sale 100,000 shares of its capital stock at $1.00 per share, payable one-half on or before December 15, 1919, and one-half on or before January———— and that said stock be first offered to the stockholders as follows: 50,000 shares to Louis Titus, 33,333 to L. E. Doan and 16,667 shares to J. F. Lucey.

If any stockholder failed to take and pay for the stock so tendered him the Board of Directors would decide what further action should be taken with reference to disposition thereof (Tr. p. 171).

Thus it will be seen that the only stockholders in the corporation (the other two directors being dummies) were given the right to buy this stock pro rata, and this right was exercised by Titus and by Lucey and secretly by Doan, who arranged with his relatives

to take a part of it, he himself taking 15,000 shares, of which 10,000 shares he transferred to his son and 5000 shares to Gatch and Morris.

On November 11, 1919, from Shreveport, Louisiana, Doan wired Dyer: "Titus and Lucey here. We have made no plans except to go along as usual" (Tr. p. 158).

Inasmuch as Doan, on the preceding day only, with Titus and Lucey had arranged to issue together 100,000 shares of the Doan Oil Company stock, this telegram of Doan's was an evasion and a trick.

DOAN testified: "I did not notify Dyer at the time this stock was issued that he could get any of it. Dyer already owed me a lot of money and I did not consider he had any interest in it whatever. I did not consider him my partner. I did not put him in touch about it, nor attempt to do so" (Tr. p. 356).

In November, 1919, this stock was worth from five to ten dollars a share (Tr. p. 383).

Doan concealed what was done at this meeting from Dyer and did not let Dyer know that there was going to be a further issue of stock. This right to buy this stock was an asset of the partnership. Doan should have used good faith toward Dyer. He did not.

Hon. Frank H. Rudkin, District Judge, in deciding this matter, held

> "Prior to November 10th, 1919, the outstanding stock of that Company consisted of 300,000 shares of the par value of $1.00 each, 100,000 of which was the property of the plaintiff and de-

fendant under their partnership agreement as found by the Court. On the above date the Board of Directors of the Corporation offered an additional 100,000 shares of stock, of the par value of $1.00 per share, for sale, at the price of $1.00 per share, to be paid for, in [57] two equal installments, on or before December 15th, 1919, and January, 1920. This additional stock was offered to the stockholders in proportion to their then holdings, 33,333 shares being allotted to the defendant Doan. It was further provided that if any stockholder failed to subscribe and pay for all or any portion of the stock thus allotted the same should be subject to the further order of the board. The plaintiff had no notice of this resolution and was given no opportunity to subscribe or pay for the additional stock. The effect of this increase upon the rights of the plaintiff becomes at once apparent. His interest in the Corporation was reduced from a one-sixth interest to a one-eighth interest and his right to participate in future dividends was curtailed in the same ratio. The only benefit the plaintiff could derive from the increase was the addition to the capital assets of the Corporation. And if the capital stock of the Company was worth more than $1.00 per share at that time his loss would necessarily exceed his gain. The Master did not deem it necessary to make a finding as to the value of the stock at the time of the second issue, as the assets of the corporation are susceptible of a division in kind, but he expressed the opinion that the stock was worth considerably more than $1.00 per share, and found that the right to purchase the additional stock was a valuable one and was a partnership asset. The opinion thus expressed and the finding as to the value of the preferred right is fully supported by the testimony. On March 20th, 1920, two days before the repudiation of the partnership agree-

men by the defendant, a dividend of $200,000.00 on the 400,000 shares was declared, and on the 16th of April, 1920, the General Petroleum Corporation was [58] given an 8 months' option on a portion of the property of the Doan Oil Company, or in the alternative on one-half of the capital stock of that Company, for $2,000,000.00, payable $50,000.00 in cash and $1,950,000.00 in stock of the Petroleum Corporation, at the rate of $200.00 per share. The $50,000.00 in cash and 1000 shares of stock of the Petroleum Corporation has already been paid or delivered under the option. From these facts it must be apparent that the right to purchase the increased stock at $1.00 per share was a valuable one and was a valuable asset of the co-partnership. The defendant Doan as a trustee of this stock will not be permitted in equity to derive a profit from his trust, nor will his family or friends, as his nominees, or otherwise. The reason given by the Master for a contrary ruling, namely, that the plaintiff did not have the means to pay for this additional stock is not convincing and does not appeal to me. If the right was a valuable one, as it unquestionably was, little difficulty should be encountered in making the necessary financial arrangements to take up the stock. The 33,333 shares in question will, therefore, be disposed of and divided in the same manner and subject to the same terms and conditions as the original."

That Dyer had ability to take care of this is shown by the letter from Seton Porter, dated December 18, 1919 (Tr. p. 305), and he also testified that he was promised any money that he wanted on this deal by Mr. Fleishhacker of the Anglo London and Paris National Bank (Tr. p. 314).

NORTH TEXAS SUPPLY COMPANY

The North Texas Supply Company was organized about the 30th of May, 1919 (Tr. p. 187).

The reason for this organization was that Captain Lucey could not go into the Wichita Falls territory. It was to be a temporary organization only until the Lucey Manufacturing Company took it over. The reason that Doan wanted Dyer to go into the North Texas Supply Company was that if Dyer would act as president and tide it over temporarily that Captain Lucey would put $50,000.00 in Shreveport (Tr. p. 301).

The average capital of that company for a year was a little over $40,000 (Tr. p. 306). Doan put $5000.00 in for his son.

At the outset it was stated by Captain Lucey that he would take care of a subscription for Dyer (Tr. p. 315) for 10,000 shares. Inasmuch as Captain Lucey did not carry Dyer, it became necessary to sell that stock in order to get the capital, so Doan and Dyer turned that subscription over to Couch. The par value of the stock was $1.00 per share. The stock was sold at 50 cents per share (Tr. p. 222).

The stock paid right along 1 per cent per month, There was a stock dividend and thereafter the stock paid three-quarters of 1 per cent per month upon the whole issue (Tr. p. 386). The book value of the stock when Dyer presided as president was $2.18.

It was agreed that if Dyer should succeed in making the North Texas Supply Company a success that

he would be given $10,000.00 in bonus stock. That bonus stock was to belong jointly to Dyer and Doan (Tr. p. 300).

Dyer at the trial in the District Court testified, at page 214, as follows:

"It was agreed that we were to have bonus stock. I was *not* to share in the bonus stock" (Tr. p. 214).

Before the case was transferred from the State Court to the Federal Court the deposition of Doan was taken and he testified:

"Q. Was he to divide the stock with you?
A. Yes, sir.
Q. Were you to get half the bonus stock?
A. Yes" (Tr. p. 262).

Quite a contradition. But that is not all.

On September 13, 1919, Doan wrote a letter to Dyer from Houston, Texas, at which place he was with Captain Lucey, in which he said:

"The Captain is much pleased with your showing. Says it is better than he expected" (Tr. p. 142). And still that is not all, for on October 14, 1919, in a letter from Doan at Shreveport to Dyer, Doan writes: "I am in receipt of a letter from Captain Lucey in which he advises that the North Texas Supply Company immediately vote you 10,000 shares bonus stock of the North Texas Supply Company (Tr. p. 148).

On October 13, 1919, Lucey wrote to Dyer and said: "I am in receipt of your statement of September 30. Please accept my congratulations on the

very splendid showing which you have made" (Tr. p. 295).

And Doan testified, at page 222 of the Transcript: "I received a letter from Captain Lucey in which he stated that the volume of business transacted was really more than what he should have done with his capital (Tr. pp. 222, 223). Yet in spite of this splendid showing of increasing the stock from 50 cents a share to $2.18 a share, of paying dividends at 1 per cent a month, then making a stock dividend of 100 per cent, paying dividends of three-quarters of 1 per per cent per month, Doan in 1920 protested against the issue of this bonus stock to Dyer.

AMERICAN OIL ENGINEERING COMPANY

Dyer went into the American Oil Engineering Company, but not until after he had discussed the matter with Doan. "I did not accept anything from them until I discussed the matter with Doan" (Tr., p. 125).

Counsel suggests that the American Oil Engineering Company made a profit on the North Texas Supply Company.

It is not true because the North Texas Supply Company sold them a rig (Tr., p. 165) and the pipe deal was made through the Lucey Manufacturing Company who made the profit (Tr., p. 313).

INTEREST

The parties had been dealing since August, 1918, sometimes one putting up money and some times others putting up money, and we think that in accord with the law of partnership, in the absence of there being any agreement to pay interest, that interest is not chargeable.

Ferrill vs. *Jones,* 39 Cal., 655;
Adams vs. *Lambard,* 80 Cal., 438;
Falkner vs. *Hendy,* 80 Cal., 630; 103 Cal., 26;
Young vs. *Canfield,* 33 Cal. App., 343;
Carpenter vs. *Hathaway,* 87 Cal., 434; 30 Cyc., 441, 443, 698, 699.

Doan had $40,000 in his hands, according to his own testimony, before May 5, 1919, from Titus (Tr., p. 214).

Doan also testified, "Before the Doan Oil Company was organized Titus had sent me money and Lucey also, and I carried that in my account as trustee for the three of us. When the Doan Oil Company was organized all prior transactions were transferred to the Company and there was a big balance of money in my hands, more than my individual share" (Tr., p. 344).

CALIFORNIA INTENDED INVESTMENT

The California crowd mentioned in the testimony was some San Francisco men that Dyer was to organize a syndicate for.

"Mr. Terry told me that he had about $50,000 subscribed for an oil company which he could call in at any time" (Tr., p. 216).

"Fifty thousad dollars was to be put into an oil operation upon land to be selected by Dyer" (Tr., p. 216).

"Dyer was to be carried with the San Francisco crowd for a quarter interest, as I understand. He told me that I had an expectation of sharing in that quarter" (Tr., p. 216).

How Mr. Doan handled this California project appears from his own letters.

On September 16, 1919 (Tr., p. 243), he writes: "I think it would be a good idea for Mr. Delaney to come over here as soon as he can. You can tell him that the Southwestern Gas Company have eight or ten thousand acres southwest of Homer which they will turn over to me on some kind of a proposition. If Mr. Delaney was here on the ground he might pick up something good for your company" (Tr., p. 243).

The first paragraph refers to Dyer's $50,000 California company (Tr., p. 244).

Another reference of Doan's to the California

crowd is in his letter of September 1, 1919, and Doan testifies, "The first paragraph of that letter refers to an eighty-acre piece that Dyer told me he was figuring on buying for his California people. I told him to go and investigate it and find out if an oil well had been brought in and if so it would be a good thing for the California Company" (Tr., p. 243).

On September 13, 1919, he writes, "I will see if anything can be picked up in Homer (Louisiana). Have not had much time to look into things up there. Will try and find something. Giffin made a sale yesterday—$1250 commission—of which Doan Oil Company gets half. I will get his salary all back pretty soon" (Tr., p. 145).

Under date of September 15, 1919, he writes, "Mr. Ray has just received information from a driller friend of his who is drilling a well ten or fifteen miles southwest of Homer.

"It looks very much like they will bring in a well. I am going to make a thorough investigation and if I can verify it will let you know. It might be a good opportunity for your California bunch, and I will probably take some for the Doan Oil Company" (Tr., p. 145).

On September 20, he writes, "If Delaney is going in with your new organization now is the time for him to be on the ground here because there will be some great opportunities" (Tr., p. 245).

"That refers to the California crowd" (Tr., p. 245).

On October 11, 1919, Doan wired from Shreveport to Dyer, "Better get your California organization together and put them on Pyron lease or something" (Tr., p. 238).

Contrast letters of September with letter of October 12, written by Doan from Shreveport, to Dyer (Tr., p. 130):

"While there is a big boom on here I have not seen anything that I can recommend to your crowd—that we cannot handle ourselves—and as I said before, I cannot afford to mix up with you on any outside deals in Louisiana—I don't want to be criticized by Titus and Captain Lucey. So I think it is the better policy for you to confine your operations in Texas and Oklahoma for the present—if I should start something else here—it will result in hard feelings, and I want to avoid that if I can" (Tr., p. 130).

On October 25, 1919, he writes, "I hope you will be able to find something for your California crowd, but I realize that it is not an easy thing to do. You will find something, however, and can soon build up a big company" (Tr., p. 247).

Is it not singular that Doan has not produced some of the letters written by Dyer respecting this and other matters?

Dyer testified, and Doan admitted (Tr., p. 216) that if they could find a piece of land for these California people Dyer would get one-fourth of the stock, which he was to divide with Doan.

In September it was the view of both of them that they might find a piece of land in Louisiana. In October evidently the "avaricious bug" had crept into Doan's head, and he was looking at things differently.

MARTIN-CONSIDINE DEAL

Dyer testified that he did all that he could and all that was required of him, that he got Terry a map, gave him data and gave him time, procured other maps for him and procured people to buy stock (Tr., p. 306).

On May 6, 1919, from Ft. Worth Doan wired Dyer at Wichita Falls, "Look up production for Terry."

On July 8, Doan wired Dyer, "Wire me all about Terry and Martin deal. Are they going to put it over? Everything going fine here" (Tr., p. 233).

On July 14, he wired, "Go to Martin, Postal Building, find out about Terry deal and wire me."

On July 28, Doan wired Dyer, "Be careful about talking to Martin about Terry deal. See Terry, and if you can help him raise any money, do it. The deal is closed. Is up to Terry and our end to raise more money, otherwise Martin will have it all" (Tr., p. 235).

THE FACTS

The facts show that Lucey wired for Dyer and Doan to go to Texas in March, 1918; that Dyer wired Doan later in May, 1918; that Dyer went to Texas and spent six weeks there; that he returned and made arrangements with Doan; that this arrangement was agreeable is shown by the letter of August 9, 1918 (Tr., p. 711).

That Lucey and Titus were in their minds as suppliers of money was shown by that letter as well as by the letters from Doan to Dyer of February 10, 1919, and February 15, 1919 (Tr., p. 218).

That they did contemplate going to Louisiana is also shown by these letters; that Titus and Lucey did furnish money is also shown (Tr., p. 214).

That Dyer was very active in and about the Lamb tract purchase and the Oklahoma tract purchase is shown by telegrams and letters; that a deal was made April 10, 1919, in Louisiana (Tr., p. 220).

And many deals were made after that. Dyer was cognizant of them all. Dyer's testimony is that he was equally interested in it at all times. If an agreement had been reached in July, 1918, and was carried out as the Master and the Court found, then the next step is May 30, 1919.

At this time Lucey is brought in so as to furnish money, and Doan claims a new deal was made and a new contract was entered into. But Mr. Doan did not plead this in his answer in this case, and the testimony shows, we contend, conclusively that no such

deal was made, that the deal was to get Dyer to handle the North Texas Supply Company in order to get $50,000 of Lucey's money for investment.

Later on June 30, 1919, the Doan Oil Company is formed. Dyer testifies that Doan told him that their interests were to be: Titus, one-half; Lucey, one-sixth; and Doan and Dyer, one-sixth.

And it would appear that this was the case, for the reason that all of the letters and telegrams are indicative of but one thing—one partner reporting to the other. Everything that transpired in Louisiana down to the time that Doan became so avaricious was reported to Dyer. We have produced Doan's letters and some of Dyer's. If Doan had produced Dyer's letters, there would not have been a demonstration of the matter one way or the other. But they were not produced.

Doan is a lawyer. He says that on May 30 he told Dyer that if he would become president of the North Texas Supply Company he would carry him for an interest in Louisiana, "but I did not tell him what that interest would be." If it were left to Doan it would be nothing (Tr., p. 190).

Doan testified some time in April or the first of May, "I told Dyer that I was going to operate in Louisiana in association with Titus, that that proposition in Louisiana would be on an entirely different basis from anything that had been, that we had talked about before, any deals we had before. That Mr. Titus would be interested with me in everything in Louisiana" (Tr., p. 185).

"As to any conversation in which I advised Dyer that I was not going to operate further in Texas, I told Dyer that on account of the business subsiding the excitement was over, that it was a dangerous thing to speculate in leases, that I had about concluded I would not venture in that deep territory, that I was afraid I would not be able to sell any leases, and I concluded that I would not put any more money in" (Tr., p. 186).

That this is not so was shown by the telegram from Titus to Doan, dated June 2, 1919 (Tr., p. 253), because Doan had wired Titus evidently, as shown by this telegram, asking him to go into a Texas deal.

The correspondence of Doan can be explained upon no other theory than that he was a partner of Dyer's. Later on, in October, he began to get the idea that he could do Dyer up, and the change appears.

Dyer kept pressing for a settlement. He demanded a settlement in November. Doan evaded that upon the ground that his mother was sick. The telegrams of December, 1919, from Dyer to Doan show that Dyer wanted a statement. The letter of January 21, 1920, from Dyer to Doan discloses what the arrangement between Doan and Dyer was, and further shows that Dyer at that time did not know anything about the 33,333 shares. It also shows that Dyer wanted to put up his share of the money (Tr., p. 195).

Note how Doan on January 23, 1920, answered (Tr., p. 196): "If you have to give up one-quarter to raise your money, I will do it for you on the same basis" (Tr., p. 197).

What does that mean?

Dyer immediately answered this letter of Doan's on January 26, 1920 (Tr., p. 197): "You ask me to write by return mail and state that you would do this on the same basis. If this is agreeable I would much prefer to handle the matter together with you on this basis. I want this absolutely agreeable to you either way, and if you prefer to have the money I will get the money and advise you at once" (Tr., p. 198).

Following this up, on February 9, 1920, Dyer again wrote Doan (Tr., p. 198): "I have not had a letter from you in answer to my last letter, asking if it was agreeable as you had mentioned on the carrying of my Doan Oil Company interest" (Tr., p. 199).

Therefore, we urge it is absolutely conclusive that they were equal partners, and we most respectfully request this Honorable Court to affirm the decree of the District Court.

A 11. Let us assume for the sake of argument that the contention of appellant that the parties were acting independently of each other is true; that Doan in April, 1919, changed the relationship of the parties and terminated the partnership if one ever existed; the fact remains that even after the termination there was no settlement of the partnership affairs, and that Doan still continued to hold the assets of the partnership or of the joint undertaking, or whatever it might be called. These assets consisted of $100,000 raised by the joint effort of the parties, and the information gathered of the various fields by both of the parties,

and especially by the efforts of Dyer, and also the good will of the venture. This good will consisted of the reasonable expectation that Lucey and Titus would furnish money to finance any deal that Doan and Dyer might recommend. The good will is an asset.

Section 655, C. C. California.

"There may be ownership of . . . the good will of a business. . . ."

Section 993, C. C.

"The good will of a business is property, transferable like any other . . ."

Section 1776, C. C.

"One who sells the good will of a business thereby warrants that he will not endeavor to draw off any of the customers."

Section 992, C. C.

"The good will of a business is the expectation of continued public patronage. . . ."

The good will of the business of the firm or joint venture of Doan & Dyer was the expectancy that Titus and Lucey would continue their patronage.

Doan appropriated this good will together with his $100,000 to his Doan Oil Company and never accounted for any of it to Dyer.

The text in 30 Cyc., 663, is as follows:

"If a partner carries on the business after dissolution, he may be compelled to account to his co-partner for the profits."

Citing

Karrick vs. *Hannaman,* 168 U. S., 328;
Tracey vs. *Power,* 127 N. W., 936 (Minn.).

"Appellant's last contention is, we think, untenable, because it disregards that fundamental principle in the law of partnership which requires good faith and mutual trust between the individual members of a partnership. This rule is aptly expressed in *Story on Partnership* (3d Ed.), Sec. 169, as follows: 'We come in the next place to the consideration of the rights, duties, and obligations of partners between themselves. And here, it may be stated that, as the contract itself has its solid foundation in the mutual respect, confidence and belief in the entire integrity of each partner, and his sincere devotion to the business and true interests of the partnership, good faith and reasonable skill and diligence and the exercise of sound judgment and discretion are naturally, if not necessarily implied from the very nature and character of the relation of partnership.' The same thing is equally well expressed in *Lindley on Partnership,* p. 303: 'The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has law on his side, but that his conduct will bear to be tried by the highest standard of honor. Thus if one partner *knows more* about the state of the partnership than another, and, *concealing* what he knows, enters into an agreement with that other relative to some matters as to which a knowledge of the state of accounts is material, such agreement will not be allowed to stand. This obligation to perfect fair-

ness and good faith is, moreover, not confined to persons who actually are partners. It extends to persons negotiating for a partnership, but between whom no partnership as yet exists, and also to persons who have dissolved partnership but who have not completely wound up and settled the partnership affairs, and most especially is good faith required to be observed where one partner is *endeavoring to get rid of another,* or to buy him out.' The necessity for good faith applies in the case of a sale by one partner to another of his partnership interest, and such sale will be sustained only when it is made for a fair consideration and upon *full disclosure* of all important information as to value. The rule applies *even after dissolution,* where partnership affairs have not been completely wound up and settled.' 22 *Am. & Eng. Ency. of Law* (2d Ed.), p. 105. The same general doctrine is announced in *Pomeroy's Equity,* Secs. 848, 852, 856, 1088."

"In transactions between partners, *concealment* becomes fraudulent when it is the duty of the party having knowledge of the facts to *disclose* them to the other, and obviously an intentional misrepresentation of the facts by one partner to the other would be a greater fraud than mere concealment. *Pom. Eq. Juris.,* Secs. 891, 902."

Ehrman vs. *Stitzel,* 90 S. W. Rep., 278.

"A person will not be permitted to benefit himself at the expense of the firm. The obligation of good faith is not even confined to persons who are actually partners. It extends to persons negotiating for a partnership, and to persons who have dissolved partnership and have not completely wound up and settled the partnership affairs. *Collier on Partnership,* page 166; *Lindley on Partnership,*

Vol. 2, page 772; 30 *Cyc.*, 438, 659 and 660; 22 *Am. & Eng. Ency. of Law* (2d Ed.), 114. . . .

The reported case applies the principle that members of a partnership should act with the utmost good faith toward each other, in *upholding the right* of a partnership to bring an action against a member thereof to recover for a loss sustained by his misconduct. The cases wherein the question has been considered are but few, but they are unanimous in holding that for a loss occasioned to a partnership by an individual member thereof, the latter is liable *as for damages. Wiggins* vs. *Markham,* 131 Ia., 102, 108; N. W., 113; *Murphy* vs. *Crafts,* 13 La. Ann., 519; 71 Am. Dec., 519; *Ball* vs. *Levin,* 48 La. Ann., 359; 19 So., 118; *Bohrer* vs. *Drake,* 33 Minn., 408; 23 N. W., 840; *Hollister* vs. *Simonson,* 36 App. Div., 63; 55 N. Y. S., 372, appeal dismissed; 170 N. Y., 337; 63 N. E., 342; *Newby* vs. *Harrell,* 99 N. C., 149; 5 S. E., 284; 6 Am. St. Rep., 503; *Gill* vs. *Wilson,* 2 Willson Civ. Cas. Ct. App. (Tex.), Sec. 380. See also the following cases which contain dicta to the same effect: *Williamson* vs. *Monroe,* 101 Fed., 322; *Roberts* vs. *Totten,* 13 Ark., 609; *Haller* vs. *Williamowicz,* 23 Ark., 366; *Levi* vs. *Karrick,* 13 Ia., 344.

In the reported case the individual partner is held to be liable for the *loss of profits.* A case very similar is *Wiggins* vs. *Markham,* 131 Ia., 102; 108 N. W., 113, wherein it appeared that one member of a firm, which was engaged in selling lands on commission, made a sale of certain lands for the firm, but afterwards cancelled the contract and sold the same purchaser lands of his own. It was held that he was liable to his partner for the amount of *profits* which would have resulted from the original transaction."

Axton vs. *Kentucky Bottlers Supply Co.* (Ky.), Ann. Cas. 1915 D—p. 75.

Equity Rule No. 19 provides:

> "The Court in every state of the proceeding must disregard any error of defect in the proceeding which does not affect the substantial rights of the parties."

The appellant has not pleaded or admitted that a partnership existed, nor has he plead that a partnership existed and was terminated by the act of Doan, nevertheless he is attempting to raise this point in the Appellate Court. If he had plead and set up that the partnership was terminated, the result would have been the same, and this Court will not reverse a judgment when it can be seen from the evidence that the result will be the same and that the judgment as entered is just.

Upon appellant's own showing it is made to appear that instead of appellant being injured by the decree entered he is benefited, for it appears that Doan has commingled the assets and instead of presenting a full and fair disclosure of his dealings he has mystified, and his transactions under such circumstances all the assets and profits belong to Dyer.

> *Lightner Mining Company* vs. *Lane,* 161 Cal., 689.

In addition to the testimony set forth showing that the relation between Dyer and Doan was not changed, the following is offered:

The first payment of Louisiana property was made

on the 10th day of April, 1919, and at this time Doan says that he had changed his relations with Dyer (Tr., p. 331); yet on the 15th of May, 1919, Doan wires from Shreveport to Dyer at Ft. Worth, "Better go to Burke tonight sell both pieces soon as possible, also Eastland acreage. Can use the money here to better advantage. Things look fine" (Tr., p. 225). Again, on May 16, 1919, Doan wires Dyer, "We have bought several pieces. Will tell you details later this week. Like Shreveport best place to do business" (Tr., pp. 225, 226).

On May 18, 1919, Doan wires Dyer from Shreveport, "We have made big purchases here of wonderful properties and need the money" (Tr., p. 226).

On June 11, 1919, from San Francisco, Doan wired Dyer, "Leaving for Shreveport Sunday night. Have arranged everything satisfactorily. Glad to hear good news" (Tr., p. 227). This telegram referred to the Giffin well in Louisiana (Dyer's Testimony, Tr., p. 306).

On June 17, 1919, Doan wires from Shreveport to Dyer, "Giffin well completed. Looks fine. Hundred barrels. Everything in all fields looks encouraging" (Tr., p. 228).

On June 24, 1919, Doan wires from Shreveport to Dyer, "That well came in a big gasser. No oil yet. Don't look good" (Tr., p. 230).

On June 25, 1919, Doan wired from Shreveport to

Dyer, "Titus and I have bought 80 acres of good stuff" (Tr., p. 231).

On July 7, 1919, Doan wired from Shreveport to Dyer, "Giffin well pumping over one hundred barrels. Hard cash offered for twenty-five thousand for Bull Bayou forty. We are putting up rig there now. Also drilling the second well on Giffin lease in the morning . . . Everything fine here" (Tr., p. 231).

On July 18, 1919, from Shreveport, Doan wired Dyer at San Francisco as follows: "Drilling at Bull Bayou big well just in near southeast corner of Pine Island lease which absolutely proves all of it. . . . Come soon as possible" (Tr., p. 234).

And this after telling Dyer to keep out of Louisiana.

At pages 233, 235, 236, 241, 243, 244, 237, 238, 246, 247, 248 and 239 of the Transcript are similar letters and telegrams wherein Doan is reporting to Dyer the inner workings of the Doan Oil Company, just as one partner would report to another partner and just as one who was not a partner would not report to an outsider.

It is inconceivable Mr. Doan would have written these letters to Mr. Dyer, as he said he did, had he severed relations with him and told him to keep out of Louisiana and stay in Texas, knowing, as he said he knew, that Texas was a deep country and not a good place to venture, and knowing, as he did, that he had appropriated all of the assets of their venture, and all

the labors of Dyer, together with the good will of the undertakings.

DYER'S CONNECTION WITH AMERICAN OIL AND ENGINEERING COMPANY

When Dyer became the president of the North Texas Supply Company, there existed an agreement between the Lucey Manufacturing Company and a competing company that the Lucey Company would keep out of the Wichita Falls territory. This agreement would terminate January 1, 1920. Then the Lucey Company would take over the North Texas Supply Company. Dyer did not become actively connected with the American Oil and Engineering Company until January 1, 1920, and then only with the consent of Mr. Doan.

Counsel in his Brief charges that Mr. Dyer did not carry out his contract with the North Texas Supply Company; that he connected himself with the American Oil and Engineering Company; that Doan had forbidden Dyer to come to Louisiana and that Doan had refused to do any more business in Texas. All these charges are based upon the testimony of Mr. Doan to the same effect.

On the 25th day of October, 1919, Mr. Doan wrote a letter from Shreveport, La., that would seem to negative all these contentions of counsel and of Mr. Doan, and makes it appear that the testimony of Mr.

Doan is a product of his imagination. In this letter Doan says:

> ". . . You must be absolutely sure that there is no break about it. I am sure, however, you will find something. And I would not tackle a wildcat. Raymond does not know anything about it.
>
> I have written Titus about the American Oil & Engineering Co. and a little later on after our wells on Section 6 are completed I may take it up with them. But I don't want you under any circumstances to mention it until we are ready to talk business, because I will have to go over the matter fully with Titus before I can offer anything."

This letter demonstrates that Doan knew that Dyer was connected with the American Company and tells him not to mention until he sees Titus. It appears from this letter that Dyer is in some way representing that company.

The letter continues:

> "Regarding the cancellation of your order with Carr. The only thing I have to say is to stand pat. I am through taking any of his bull. I will go to the bat with him at any time. And I suggest that you keep on selling rigs wherever you can—Shreveport or any other place.
>
> THEY HAVE VIOLATED EVERY AGREEMENT WITH THE NORTH TEXAS SUPPLY COMPANY and you ARE AT LIBERTY TO DO AS YOU PLEASE. . . .
>
> I hope you will be able to find something for your California crowd, but I realize that it is no easy thing to do. You will find something, however, and can build up a big company" (Tr., p. 246).

Doan testified that he would not carry out his agreement to turn over Doan Oil Company stock to Dyer because he had not carried out his agreement with the North Texas Supply Company, and here in this letter he says that the Lucey Company has violated every agreement. That would absolve Dyer.

Even if Dyer was connected with the American Company, the connection was not adverse to the Texas Company. More, right in this letter, Dyer has the approval of Doan.

At page 32 of the Brief, counsel states that Doan agreed to carry Dyer in the Doan Oil Company to the extent of 50,000 shares worth probably $8 to $10 per share and originally costing $1 per share because Doan's son was interested to the extent of $5,000 in the North Texas Supply Company. This does not sound plausible.

A PARTNERSHIP RELATING TO LOUISIANA

Under this heading at page 42, counsel claims that in the absence of an agreement with Titus and Lucey, Dyer cannot become a partner with them in the Doan Oil Company. But the Doan Oil Company is a corporation, and Dyer can certainly hold stock in it. But assuming that it was once a partnership, there is no necessity to hold that Dyer could not recover any of the assets because he could not become a partner. Doan would still be the partner, and a court of equity would impress a trust upon Mr. Doan for the benefit of his partner, Mr. Dyer. Dyer would not

become a partner, the trust would be impressed upon Doan, and if it became necessary the partnership would be dissolved.

In 30 Cyc. 605, the text is as follows:

> "The legal power of a partner to make a legal transfer of his interest to a third person is unquestioned. The transferee, however, does not become a tenant in common with the other partners in any specific goods, but acquires only the interest his vendor had, which is his share of the residue after the affairs of the firm are settled and the debts paid, including debts due from the firm to a partner. Such purchase does not make the buyer a partner in the firm, without the concurrence of all the partners, either given expressly or implied from conduct."

The complainant is not endeavoring to prove that he is a partner with Lucey and Titus, but merely that he is a partner with Doan, and that Doan holds stock in the Doan Oil Company in trust for Dyer. Titus and Lucey are not parties to the suit at bar.

At pages 44 and 45 of the Brief, counsel reviews the testimony of witnesses that they had heard Doan say that Dyer was associated with him in the Louisiana properties. Counsel says that it is impossible to reconcile the testimony of Mr. Berry with the uncontradicted evidence of Doan corroborated and supported by the exhibits to which we have last referred. On the contrary, the testimony of Mr. Berry is corroborated by all of these exhibits and by the letters

and telegrams of Mr. Doan. The testimony of Mr. Doan is contradicted by his own letters and telegrams, as appears from this Brief.

AUTHORITIES CITED BY APPELLANT

In *Wheeler* vs. *Farmer,* 38 Cal., 203, Wheeler was the owner of a patent, and agreed with Farmer that he should sell the article and pay over to Wheeler one-half and retain one-half. The Court held that this was not a partnership; there was nothing joint about it. They were not associated in business. The business was conducted entirely by Farmer. It has no application to the case at bar. In the case at bar there was a common fund and a division of profits.

The *Wheeler* case was the ordinary commercial transaction where a vendor receives goods and sells them at his own expense and turns back a certain sum.

Coward vs. *Clanton,* 122 Cal., 451, is a very strong case against the appellant. The Court held that there was no partnership where a real estate agent sold lands for an owner and was to pay all expenses out of the proceeds and then divide the profits above a certain sum, for the reason that the owner and the broker were not associated together in business; but the Court also held that nevertheless the broker was entitled to an accounting of the profits, even though there was no partnership. So in the case at bar there must be an accounting whether there is a partnership or not. This case virtually throws appellant out of Court.

As was said in this case the question is not, was there a partnership? but is, is the complainant entitled to an accounting?

Jones vs. *Title Guaranty etc. Co.,* 178 Cal., 378, as to what constitutes a partnership, cites and decides the same principle as does *Coward* vs. *Colton.*

Reynolds vs. *Jackson,* 25 Cal. App., 490, is more strongly against the appellant than is *Coward* vs. *Clanton,* for it decides practically the same questions and in addition adds that the Appellate Court will not review testimony where testimony given in the Court below is *viva voce* and conflicting. At page 496 the Court said:

> "We are called upon to perform a duty which, in the very nature of things, a reviewing Court cannot well be expected satisfactorily to discharge: viz., weighing and so determining the credit to be accorded testimony given *viva voce* before another tribunal."

The rest of the cases cited by counsel are similar to the ones we have here reviewed, and for that reason time and space will not be taken to review them.

At page 53 of his Brief, counsel speaks of Dyer's conduct of the North Texas Supply Company as a total failure of consideration.

We have called attention to the fact that Captain Lucey, the president of the parent company and the one most interested in the success of this company, was well satisfied with the conduct of Mr. Dyer, and ordered that the bonus stock be issued to him; this

stock was never issued to him, for the reason that Mr. Doan silently and secretly presented a protest (Tr., p. 257).

Here is the record as it appears from the transcript and referred to in this Brief.

First, Carr refuses to furnish the supplies to Dyer; second, Doan writes Dyer that the Lucey Company has violated all its agreements and you are at liberty to do as you please (Tr., 246); third, Lucey is well satisfied and orders the bonus stock issued to Dyer and says that he has done better than he expected; and last, Doan puts in a protest and stops the issuance of the stock (Tr., p. 257). Counsel calls this a want of consideration, and asks this Court to reverse the lower Court that heard Mr. Doan testify to these matters. We ask the Court to apply the rule laid down in the case cited by counsel in his Brief: to wit, *Reynolds* vs. *Jackson,* 25 Cal. App., 490, 496.

At page 61, counsel states that Doan did not profit a single dollar in any of Dyer's activities during the time that Doan was engaged in developing the Louisiana holdings.

It requires money to operate in an old field, as will be seen from reading the letter written by Doan to Dyer, while Doan was in the Balboa building. "We must have $100,000." Now, Doan had all this money in the Doan Oil Company, and he even had Dyer's automobile. Under the circumstances Dyer did remarkably well.

STOCK OFFERED STOCKHOLDERS

In dealing with this stock, Doan should have exercised the highest good faith, and if he had no money with which to purchase the stock he should have called the attention of Mr. Dyer to the fact that the stock was offered (*Dennis* vs. *Gordon,* 163 Cal., 427). This would have enabled Mr. Dyer either to have borrowed money to take it up or to have sold it on the market at its value—$8 or $10, or whatever the market was. If this stock was issued to Gatch and Morris to pay an obligation of the partnership, it should have been issued at the market price, and the personal stock of Doan should not have been taken to satisfy a company obligation. Treasury stock should have been issued.

Counsel states that the stock was issued subsequent to the termination of the partnership. But it was not issued subsequent to the termination of the trust relation that still existed.

DISCRETION

Equity will not allow one partner to exercise a discretion that disposes of stock worth $8 or $10 a share for $1 per share. At any rate, the matter should have been called to the attention of Dyer (*Dennis* vs. *Gordon, supra*).

APPELLANT IS ENTITLED TO INTEREST UPON MONEYS ADVANCED

The Court allowed each interest from the day of termination of the partnership, March 22, 1920, to

the day his report was filed, September 19, 1921. This was in accordance with the rule that capital furnished bears no interest (Cal. C. C., Sec. 2403), and no interest is allowed. Interest is allowed from the date of termination upon the theory that all balances should be settled upon that day.

Reply to contention of counsel at page 78 that the allegations of the complaint should control, we say that the allegations of the complaint are denied by the answer, and a complaint is not in such a case evidence, and the evidence will control. This case does not come within the exception. The letters of Doan show that they were to raise $100,000, and there is evidence that Titus furnished $40,000 of this. If Titus furnished money for the partnership he received his compensation from his shares of stock. Doan should not have interest on moneys advanced by Titus. The trouble with the whole matter is that Mr. Doan refused to file a full statement of where the moneys came from. Counsel is now contending for interest upon these funds furnished by Titus and from moneys perhaps furnished by Lucey. This cannot be done. And no case will bear him out in this contention. There is no testimony that Mr. Dyer was to pay $50,000 to Mr. Doan as a personal loan from Mr. Doan. There is no testimony where this $50,000 was to go to.

Mr. Doan should have made a full disclosure of these matters.

In conclusion we urge upon the Court the following facts:

First, the letters written by Doan to Dyer establish a partnership relation; and these letters become a written contract, and this contract cannot be varied by the oral testimony of Mr. Doan, nor can they be varied by his later wirings or telegrams. This relation being established between the parties, a confidential relation is established and it then becomes the duty of Doan to act in the highest good faith toward Dyer. The burden of proof is cast upon Doan to establish that all his transaction concerning the partnership property and all partnership relations have been fair and just.

Second, Mr. Doan has not made a full and fair disclosure of all his transactions concerning the property of this partnership, and it appears from the testimony that his oral testimony varies from his writing and telegrams. In these respects he has failed to measure up to the full demand of the law, and all presumptions are by the law thrown against Mr. Doan. And the presumption asserts itself that the transactions are as contended for by the complainant and in accordance with the findings of the Court.

Third, that it is immaterial whether or not the relation between the parties is a partnership or a joint venture, as the only question is, is the complainant entitled to an accounting, and is the defendant a trustee

of the complainant with certain funds in his possession?

We respectfully submit that the judgment as entered by the Court below is just and in accordance with the law and equity and is fully sustained by the evidence and should not be reversed on any mere technicality.

Respectfully submitted,

W. H. METSON,
R. G. HUDSON,
Solicitors and Attorneys for Appellee.

Dated, October 23, 1922.